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No.

In the Supreme Court of the United States

JON D. BECKER, D.D.S.,
Petitioner,

v.

MARK MACSENTI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When expert opinion testimony is challenged by a motion to strike at the close of all evidence (and in connection with a Rule 50 motion) instead of by a contemporaneous objection, does the danger of unfair surprise to the opposing party relieve a federal court of its duty to make a *Daubert* reliability determination?

PARTIES TO THE PROCEEDINGS

Petitioner

Jon D. Becker, D.D.S., an individual with no corporate affiliations.

Respondent

Mark Macsenti

Other Parties

Heather Davis, Dr. Becker's dental assistant, was a defendant in the trial court and has no interest in the outcome of the petition.

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Jon D. Becker, D.D.S. ("Becker") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 237 F.3d 1223 (10th Cir. 2001) and is reproduced in App. A at 1a-51a. The written order of the United States District Court for the Western District of Oklahoma denying Becker's postjudgment motion for judgment as a matter of law is unpublished and is reproduced in App. B at 52a-58a. The District Court's judgment is reproduced in App. C at 59a-60a. The transcription of the district court's oral pronouncements of its decisions on Becker's prejudgment motions for judgment as a matter of law are reproduced in App. D at 61a-63a [motion made after close of all evidence] and App. E at 64a-65a [motion made at conclusion of plaintiff's evidence]. The transcription of the district court's oral decision on Becker's motion to strike the testimony of the expert witness is reproduced in App. D at 61a -63a.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on January 22, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Rule 702 of the Federal Rules of Evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of

fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Rule 50 of the Federal Rules of Civil Procedure:

(a) Judgment as a Matter of Law.

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the

jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

* * *

STATEMENT OF THE CASE

The issue presented is whether the trial court and court of appeals can refuse to conduct a *Daubert* reliability analysis of expert opinion testimony when the reliability of that testimony is challenged by a motion to strike as opposed to an objection to the testimony at the time the testimony is given. Here, both courts refused to examine the reliability of the

respondent's expert's opinion testimony of causation when petitioner Becker moved to strike the expert's testimony and challenged the sufficiency of the evidence to support the verdict under Rule 50 of the Federal Rules of Civil Procedure.

This judgment should have been reversed because there is no *reliable* scientific evidence to support the verdict that respondent Macsenti's physical condition was *caused by* petitioner Becker. Macsenti's expert's opinions of causation were not based on any reliable scientific proof or medically accepted theory. The coincidence of Macsenti's condition and his treatment by Becker, supported solely by the *ipse dixit* of Macsenti's expert witness, is not enough. But, neither the trial court nor the court of appeals analyzed Macsenti's expert's *ipse dixit* to determine whether it was reliable because Becker's challenge to the expert's opinion came in the form of a motion to strike instead of an objection to the testimony at the time it was given. Both the trial court and the court of appeals refused to examine the reliability of the opinion testimony in examining the sufficiency of the evidence to support the jury's verdict. The court of appeals held that the danger of unfair surprise to Macsenti obviated the need for any *Daubert* analysis.

Nature of the Case and Procedural History

This case arises from claims of malpractice by a dentist. Respondent Mark Macsenti, plaintiff/appellee below, alleged he suffered brain damage caused by diffusion hypoxia during the course of a dental implant procedure performed by petitioner Becker. Becker used a combination of oral medications and nitrous oxide to sedate Macsenti during the procedure. The procedure was prolonged, and Macsenti received the nitrous oxide for 8 to 10 hours.

Macsenti filed his Complaint on August 26, 1997, and his First Amended Complaint on December 12, 1997. The trial court had diversity jurisdiction pursuant to 28 U.S.C. § 1332. Macsenti's Amended Complaint asserted claims for negligence, intentional infliction of emotional distress, and negligence per se against Dr. Becker and claims for negligence and gross negligence against Heather Davis, Becker's dental assistant.

At trial, Macsenti presented the testimony of an expert witness who testified, based solely on his training and experience, that Macsenti suffered brain damage caused by the combination of nitrous oxide and oral medications which caused a low level of hypoxia over an extended period of time. Macsenti, a Californian, had been at various times a musician, a carpenter, and a house painter. It is undisputed that Macsenti does have at least some mild level of impairment. However, his condition could have existed before he ever was treated by Becker. The type of brain impairment Macsenti has could have been caused by, *inter alia*, a blow to the head, inhaling paint fumes or by drug use -- but not by nitrous oxide.

Diffusion Hypoxia Testimony Unreliable

All known scientific studies state that diffusion hypoxia can occur, if at all, only after administration of nitrous oxide is turned off. It lasts for only two to three minutes and its effect is slight. Thus, the length of time Macsenti may have been receiving nitrous oxide is irrelevant.

Scientific studies show that diffusion hypoxia cannot occur when concentrations of oxygen are 21% (room air) or greater. The stipulated facts in this case demonstrate that the "flow meter" in Becker's dental office was working properly,

and was not capable of delivering any less than 30% oxygen. Any threat of diffusion hypoxia can be eliminated by performing an oxygen flush for approximately two minutes after the nitrous oxide is turned off, and Becker always did this.

Contrary to all known scientific studies, Macsenti's expert witness opined that Macsenti suffered brain damage caused by a diffusion hypoxia that lasted for a considerable period of time. The expert stated that the oral medications Macsenti was given potentiated a decrease in his respiratory rate. The expert testified to a "new" version of diffusion hypoxia which he claimed occurs as nitrous oxide passes *into* the bloodstream. All known scientific literature, however, shows that diffusion hypoxia occurs when nitrous oxide is *leaving* the bloodstream.

To compound the problem facing Becker's counsel, Macsenti's expert had previously testified in a proceeding before the Oklahoma Dental Board. Before that administrative body of his peers, who would presumably know better, the expert's description of diffusion hypoxia was consistent with the scientific literature. However, he changed his description of diffusion hypoxia for the first time at trial.

Macsenti's expert had to testify contrary to all known science because two or three minutes of depressed oxygenation of the blood will not cause brain damage -- people can stop breathing for that long with no resulting brain damage.

Potentiation of Medications Testimony Unreliable

In addition to his unsupported description of diffusion hypoxia, Macsenti's expert also testified that the combination

of medications administered to Macsenti depressed his respiratory rate thereby causing him brain damage. The expert testified that the effects of Mepergan Fortis, commonly used in dental procedures, was potentiated or enhanced by having been combined with Halcion. However, this theory was based solely on the expert's *ipse dixit*. No scientific study, report or data supported this theory. On the other hand, Becker introduced several scientific articles showing that combinations of similar medications to those administered by Becker did not cause any respiratory depression or potentiation of Mepergan Fortis. Thus, *reliable* science says there is no "potentiation."

Unreliable Testimony Challenged by Motion to Strike

At the close of Macsenti's evidence, co-defendant Davis' Motion for Judgment as a Matter of Law was sustained by the Court, while Becker's motion was denied. At the close of all the evidence, when the trial court first could have made a determination based on all of the evidence, Becker moved to strike the testimony of Macsenti's expert as unreliable based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and renewed his motion for judgment as a matter of law. The trial court overruled both motions. The trial court did not analyze the reliability of the expert's testimony for the sole reason that his opinion testimony had already been admitted and any objection should have been presented before the expert testified. On June 12, 1998, the jury returned a verdict against Becker for negligence and for intentional infliction of emotional distress, indicating $500,000.00 as damages for each claim. The jury returned a verdict awarding $300,000.00 punitive damages on June 15, 1998.

After judgment was entered, Becker filed a Renewed Motion for Judgment as a Matter of Law as well as motions for new trial, amendment of the judgment and for remittitur. The trial court denied Becker's post trial motions on November 13, 1998. Consistent with *Kinser v. Gehl Company*, 184 F.3d 1259 (10th Cir. 1999) [since abrogated by *Weisgram v. Marley Company*, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000)], the district court rejected Becker's renewed postjudgment motion for judgment as a matter of law based on the evidence which was admitted at trial, without addressing the reliability of that evidence: "The undersigned, having presided during all aspects of these proceedings, finds that the evidence admitted at trial was sufficient to support the jury's verdict in plaintiff's favor." [November 13, 1998, *Order*, at p. 2 -- App. B at 53a.]

Becker appealed the judgment to the Tenth Circuit Court of Appeals, which exercised jurisdiction pursuant to 28 U.S.C. § 1291. The Tenth Circuit filed its opinion on January 22, 2001. The Tenth Circuit similarly failed to conduct a *Daubert* analysis of Macsenti's opinion evidence of causation. It held that Becker's *Daubert* objection was waived by failing to object to the testimony at the time it was given, and therefore reviewed only for "plain error." The Tenth Circuit reasoned that to hold otherwise would give Becker an unfair advantage -- "depriving the trial court of the opportunity to make a *Daubert* analysis and denying plaintiff Macsenti the opportunity to support the reliability and relevance of his evidence by further proof and argument." *Macsenti v. Becker*, 237 F.3d at 1233 [App. A at 18a].

The Tenth Circuit's requirement of a contemporaneous objection is particularly troublesome for Becker because the expert's opinion was not objectionable under the controlling case authority in the Tenth Circuit at the time of trial. As

noted above, Macsenti's expert testified based on his experience and training. The Tenth Circuit's governing case at the time of trial, *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996), "dictated that trial courts must conduct a gatekeeper inquiry only where evidence is based upon 'a particular methodology or technique,' and not where it is 'based solely on experience or training. *Id.* at 1518-19." *United States v. Velarde*, 214 F.3d 1204 (10th Cir. 2000).

The court in *Velarde* observed that prior to this Court's decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), trial courts were "denied the benefits of *Kumho*'s explicit guidance and its abrogation of *Compton*." *United States v. Velarde*, 214 F.3d at fn 4. Thus, a contemporaneous objection to Macsenti's expert's testimony would not have apprised the trial court of the need to make a *Daubert* analysis on the record. And, as discussed more fully below, Becker's pre-verdict motion for judgment as a matter of law was sufficient to apprise Macsenti of the alleged deficiencies in his evidence. Therefore, Becker gains no unfair advantage by not having objected to the expert's testimony at the time.

Becker's objection to his opponent's expert witness testimony was presented at the only point in the proceedings the trial court could have made a fully informed reliability determination. In the instant case, there was not, as there was in *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1192 (11th Cir. 1995), a total lack of any objection by Becker. Constrained by existing Tenth Circuit precedent, Becker did not object to the testimony as it came in but instead Becker moved to strike the testimony at the close of the evidence and before the case was submitted to the jury. It was not until all the evidence was in, including the testimony of Becker and his own expert witnesses, that Becker had sufficiently established

the lack of reliability of the plaintiff's expert. Becker's motion to strike the expert's testimony, along with Becker's second pre-verdict motion for judgment as a matter of law, put both the trial court and the trial court plaintiff on notice of the deficiency in plaintiff's evidence of causation.

The Tenth Circuit's opinion in the instant case also rejected the significance of the fact that Macsenti's expert unexpectedly testified to a new theory for the first time at trial. [Opinion at footnote 5; App. A at 20a.] Although the Tenth Circuit stated that the fact of a new theory should have alerted Becker's counsel to the need to object, practical considerations dictate otherwise. Hearing a new theory for the first time during trial, counsel was unable to ascertain (by resort to consulting with his own experts or by his own independent research) whether the new theory is reliable or unreliable. It is true that the fact that a witness is testifying to something different than his previous testimony can be used as impeachment. However, changed or inconsistent testimony, in and of itself, is not grounds to object to the new version's admissibility. Trial counsel should be entitled to presume that the expert's new opinion will be supported by evidence later introduced by the plaintiff. If it is not, a challenge to the unreliable opinion by a motion to strike is both appropriate and timely.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion Decides an Important Federal Question Which Conflicts with This Court's Decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Weisgram v. Marley Company*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), this Court established the obligation of the trial courts to ensure that expert scientific testimony presented pursuant to Rule 702 of the Federal Rules of Evidence is both relevant and reliable. That duty was clarified in *Kumho Tire Co. v. Carmichael, supra*, to extend to all expert opinions. *Kumho* also established that the *Daubert* reliability factors were not exclusive, but were meant to provide trial courts with a flexible guide to be used with discretion based on a particular case. However, this Court's opinions in *Daubert* and *Kumho Tire* do not authorize a trial court to avoid its obligation to determine that expert opinion testimony is reliable. See *Kumho Tire*, 526 U.S. at 158-159 (the discretion endorsed by *Daubert* "is not discretion to abandon the gatekeeping function . . . [and] is not discretion to perform the function inadequately.") (Scalia, J., concurring).

The Tenth Circuit's opinion in the present case, however, authorizes a total abandonment of the trial court's duty to determine the reliability of expert opinion testimony when the *initial admission* of that testimony is not challenged. Even though the reliability of the expert opinion was challenged before the case was submitted to the jury, the Tenth Circuit essentially held no reliability determination was

required because the lack of a contemporaneous objection to the opinion testimony would give the objecting party an "unfair advantage."

The Tenth Circuit's "unfair advantage" rationale is inconsistent with the duties imposed by Rule 50 as well as this Court's reasoning in *Weisgram v. Marley Company*, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000).

> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. [Citations and footnote omitted.] It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.

Id., 528 U.S. at 455-456.

Thus, this Court has already determined that the Tenth Circuit's justification -- the fear of a party being disadvantaged by not having the opportunity to have a second chance at shoring up their expert's testimony -- is "implausible." *Id.* Becker gained no unfair advantage over Macsenti by challenging Macsenti's expert via a motion to strike his testimony instead of by contemporaneous objection. Becker's challenge was still made early enough to avoid any

"unfair surprise" to Macsenti as expressly provided by Rule 50 of the Federal Rules of Civil Procedure.

The Rule 50 requirement of "pre-verdict" motions for judgment as a matter of law is designed to "provide notice to the trial court and to opposing counsel of any deficiencies in the opposing party's case before it reaches the jury, while the deficiencies still may be corrected." 9 *Moore's Federal Practice - Civil*, § 50.02(3). The pre-verdict notice requirement "prevents movants from waiting until after the case is submitted to the jury to inform the court and opposing parties of any evidentiary defects, thereby preventing movants from gaining an unfair advantage through surprise." *Id.* Also see Advisory Committee Notes to the 1991 Amendments to Rule 50(a) ("The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment.").

So, in the instant case, the Tenth Circuit erred in basing its decision on the potential of an "unfair advantage" which might be gained from not making an objection to the expert's testimony before he testified. The safeguard against any unfair surprise is a feature already built in to the Rule 50 motion itself. The Tenth Circuit approach utilizes two methods to prevent "unfair advantage" to the non-movant, and no process to determine that the expert opinion testimony is reliable and sufficient to support the jury's verdict. The Tenth Circuit opinion is contrary to *Daubert* and *Weisgram*, and should be corrected on certiorari.

In *Weisgram*, this Court has expressly rejected cases which reviewed decisions on Rule 50 motions for judgment as a matter of law based on the record which was submitted to

the jury, without excising evidence inadmissible under Federal Rule of Evidence 702:

> These decisions are of questionable consistency with Rule 50(a)(1), which states that in ruling on a motion for judgment as a matter of law, the court is to inquire whether there is any "legally sufficient evidentiary basis for a reasonable jury to find for [the opponent of the motion]." Inadmissible evidence contributes nothing to a "legally sufficient evidentiary basis." See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). [Footnote omitted.]

Weisgram v. Marley Company, 528 U.S. at 453-454.

Indeed, *Weisgram* is consistent with the Advisory Committee Notes to the 1991 Amendments to Rule 50(b):

> In ruling on such a motion [a motion for judgment as a matter of law made at the close of the evidence], the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it.

In the present case, the trial court conducted no *Daubert* analysis whatsoever -- made no determination of

whether there was a "legally sufficient evidentiary basis" that Becker's conduct *caused* Macsenti's injury. The trial court simply said her gatekeeping function was complete once the evidence was admitted. The Tenth Circuit Court of Appeals agreed. But, Becker's counsel could not effectively make a *Daubert* reliability objection when the testimony came in because (a) it was unexpectedly changed from the expert's earlier testimony, (b) the expert's new theory might have been supported by plaintiff's later evidence, and (c) existing Tenth Circuit authority did not require the trial court to make an explicit reliability determination. The Tenth Circuit approved a verdict of $1.3 million against Becker without making any determination as to whether the plaintiff's expert's opinion was sufficiently reliable to support the jury's verdict.

II. Requirement of a Contemporaneous Objection to Expert Opinion Testimony Has Not Been, But Should Be, Expressly Decided by This Court.

Daubert has generated much discussion and hundreds of court opinions in the short time since it was rendered as district courts and appellate courts attempt to interpret it. The *Daubert* opinion itself does not address the issue of *when* an objection must be made to the reliability and relevance of an expert's opinion testimony. Several circuits, including the Tenth, have construed *Daubert* to require a contemporaneous objection to unreliable/irrelevant opinion testimony which is impractical and inconsistent with the courts' duties in determining sufficiency of evidence issues under Rule 50.

For example, the opinion in the instant case follows the Ninth Circuit's opinion in *Marbled Murrelet v. Babbitt*, 83

F.3d 1060 (9th Cir. 1996) to hold that sufficiency of the evidence cannot be challenged in a Rule 50 motion in the absence of a contemporaneous objection to even unreliable expert testimony. The *Marbled Murrelet* decision seems to have established a growing trend, as it has been followed within that circuit (see, *e.g.*, *Bartleson v. United States*, 96 F.3d 1270 (9th Cir. 1996)) as well as by the Tenth Circuit (*Goebel v. Denver and Rio Grande Western Railroad Company*, 215 F.3d 1083, 1088 (10th Cir. 2000)), and at least one district court outside of the Ninth Circuit, *Waitek v. Dalkon Shield Claimants Trust*, 934 F.Supp. 1068, 1080 (N.D. Iowa 1996). And, the Eleventh Circuit's opinion in *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1192 (11th Cir. 1995) is also cited as authority for the proposition that no *Daubert* analysis need be performed when a contemporaneous objection is not made. But, how can a trial court make the decision until all of the evidence is in?

At the close of the evidence in the instant case, Becker presented a *Daubert* motion to exclude Sullivan's testimony and a motion for judgment as a matter of law. The trial court's denial of the motion to strike Sullivan's testimony (and Becker's Rule 50 motion) was based on the mistaken notion that a *Daubert* motion must be presented before trial:

> THE COURT: I think the time to make that motion is before he testifies.
>
> * * *
>
> THE COURT: Well, I act as a gatekeeper. That gate opened up when he [Sullivan] testified and now the jury is your gatekeeper. I don't think its appropriate for

> me to make a *Daubert* ruling after the testimony has come in.

The trial court's Order denying Becker's post-trial Rule 50 motion similarly shows she did not perform any kind of *Daubert* analysis. Instead, the trial court simply based her decision *on the evidence which was admitted*: "The undersigned, having presided during all aspects of these proceedings, finds that *the evidence admitted at trial* was sufficient to support the jury's verdict in plaintiff's favor." (Emphasis added.) The Order makes no finding as to the *reliability* of plaintiff's expert's testimony.

While the most common scenario is to present a *Daubert*-type motion before trial, it is not required. Here, in fact, it was impossible because it was not known, or foreseeable, that the expert was going to change his testimony and give a description of *diffusion hypoxia* unknown to medical science and at odds with his previous testimony. The only course of action when faced with *new* evidence is to wait and see whether the new theory is supportable. We did not know how to deal with this new theory revealed for the first time in a courtroom.

The Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE provides:

> Even if admitted, however, the evidence may be legally insufficient, warranting entry of judgment as a mater of law before or at trial. [p. 29.]

> Even if admissible, evidence may be insufficient to allow a juror to conclude that the position more likely than not is true. The

> trial judge may then direct a judgment for the defendant. [p. 51.]

That same source, at page 106, tells us that Federal Rule of Evidence 703 "provides a mechanism by which the court can evaluate the *trustworthiness of the underlying data* on which the expert relies." (Emphasis added.) *Head v. Lithonia Corp., Inc.*, 881 F.2d 941, 943 (10th Cir. 1989). In some cases the court cannot even evaluate the "underlying data" until all the evidence is in. And we do not know what all of the evidence is until the plaintiff rests. And then, as the Reference Manual advises (p. 106), "District Judges may reject opinions founded on critical facts that are plainly untrustworthy, principally because such an opinion cannot be helpful to the jury." *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1114 (5th Cir. 1991).

The mere fact that the expert's testimony is in the record does not make that testimony *legally sufficient* for purposes of a Rule 50 motion. For instance, in *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722 (10th Cir. 1993), the trial court directed a verdict in favor of the defendants. Although testimony of plaintiff's damages had been received, without objection, the directed verdict was affirmed. The trial court was not precluded from considering whether that testimony was *competent*: "By granting the defendants' motion for a directed verdict, the district court unquestionably found that Mr. Tal's opinion was not competent evidence of damages. This is consistent with the district court's independent duty to determine the qualifications of a witness to testify." *Id.*, 993 F.2d at 728.

Trial courts have latitude in allowing expert testimony and then subsequently striking such testimony from the record. *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir.

1967). The court may admit evidence and then strike it when it is shown to have no basis. *See United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993):

> If cross-examination reveals that the opinions advanced by an expert rest on a wholly inadequate foundation, the judge, on timely motion, may strike the testimony. [citations omitted.]

A case strikingly similar to ours is *Lima v. United States*, 708 F.2d 502 (10th Cir. 1983). Plaintiff Lima alleged his Guillain-Barre Syndrome ("GBS") was brought on by a swine flu vaccination. Plaintiff called an expert who was allowed to testify based on an exhibit just produced on the morning of trial. At the close of that expert's testimony, the defendant objected to it because it was based on an exhibit which was unreliable and not of a type reasonably relied on by experts in the field. That objection was overruled.

> *After the trial*, defendant renewed its objection to Dr. Johnson's testimony. The trial court granted defendant's motion to strike on the basis that Dr. Johnson's opinion did not reach the threshold standards for admissibility as set forth under Fed.R.Evid. 703. [Emphasis added.]

Lima, *supra* at 507.

The plaintiff appealed, phrasing the issue as whether the trial court erred in first admitting the opinion testimony of his expert witness, "and later striking it after the close of the evidence. . . ." But, the Tenth Circuit found no error in that procedure in that case.

There is no requirement that a *Daubert* motion be made at any particular time. If one knows in advance that the testimony will be unsupported (which we did not), it might be wise to raise such a motion early. But it is the plaintiff's burden to prove that the expert's testimony is supported. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). If the plaintiff does not do that, then the testimony must be stricken.

This Court should send a clear directive to the federal district courts and appellate courts that the duty to determine the sufficiency of expert opinion evidence to support a verdict in the face of a Rule 50 motion is not dependent on an objection to the evidence at the time of its admission. A verdict must still have competent evidence to support it. A Rule 50 motion itself provides adequate warning to both the trial court and to the opposing party of evidentiary deficiencies in plenty of time for corrective action to be taken. It is implausible to believe that a party will not take its best shot at presenting expert testimony hoping for "do-overs" if their first attempt fails.

Review of the Tenth Circuit's opinion on certiorari is warranted to correct the erroneous decision in this case and to provide explicit direction to federal courts that the duty to conduct a *Daubert* reliability analysis is not dependent on a contemporaneous objection to unreliable expert opinion testimony.

CONCLUSION

A *Daubert* reliability analysis of expert opinion testimony is required whenever the reliability of such testimony is challenged before the case is submitted to the jury. A contemporaneous objection is not required. The

circuit court's decision placing the danger of "unfair advantage" ahead of the requirement for reliable expert opinion testimony to support a jury verdict is erroneous and should be corrected. Petitioner Jon Becker respectfully submits that his petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed January 22, 2001]

Nos. 98-6485, 99-6012

MARK MACSENTI, *Plaintiff-Appellee and Cross-Appellant*,	)
v.	)
JON D. BECKER, D.D.S., *Defendant-Appellant and Cross-Appellee*,	)
HEATHER DAVIS, *Defendant*.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. (D.C. No. CV-97-1398-C).

Before EBEL, HOLLOWAY and HENRY, Circuit Judges.

OPINION

HOLLOWAY, Circuit Judge.

Plaintiff/appellee Mark Macsenti sued his dentist, defendant/appellant Jon Becker, and Becker's assistant, Heather Davis, for injuries he allegedly suffered during a 1996 dental procedure performed in Becker's office in Clinton, Oklahoma. Macsenti sought relief under theories of negligence and intentional infliction of emotional distress, *inter alia*. Jurisdiction in the district court was based on diversity of citizenship. At the close of the plaintiff's evidence, the district judge granted judgment as a matter of law in favor of Heather Davis, but denied a motion by Becker for such a judgment. (Hereinafter in this opinion we will use "defendant" only to refer to Dr. Becker.) The jury ultimately awarded compensatory and punitive damages to plaintiff Macsenti, and Becker's post-trial motions challenging the verdict were denied. Becker now brings this appeal from the district court's judgment, invoking our jurisdiction under 28 U.S.C. § 1291. The cross-appeal of plaintiff challenges the denial of prejudgment interest by the trial judge.

I

Defendant Becker had a dental practice in Clinton, Oklahoma. Plaintiff Macsenti went in to defendant's office for removal of one molar and for dental implants on July 15, 1996, about 9:00 a.m., a procedure expected to take no more than three hours. The procedure was not begun until plaintiff had already been in the office for some time. Defendant had decided to place plaintiff under "conscious sedation" for the procedure, and the first thing done was to order medications,

which were picked up from a local pharmacy. About 11:00 a.m. plaintiff was given the medications, whose trade names were halcion and mepergan fortis. According to plaintiff's evidence, he was also put on nitrous oxide at the same time and remained under nitrous oxide for most of the remainder of the day and evening. One of plaintiff's experts, Dr. Sullivan, testified the particular procedure defendant was to perform should take less than an hour. III App. at 661. The procedure could have been done without the use of halcion, mepergan fortis and nitrous oxide. *Id.* at 662.

Ms. Shirley Teague testified that the day of plaintiff's procedure was the first and last day of her employment as defendant's dental assistant. II App. 343. Ms. Teague had recently completed a "dental lab" program at Moore/Norman Vo-Tech School for one year. On July 15, 1996 Heather Davis was at defendant's dental office, and she showed Teague how he liked his tray of instruments set up. Teague saw plaintiff Macsenti first around 11:00 a.m. *Id.* at 345. Teague and Davis assisted Dr. Becker with a couple of other patients early that day. According to Teague, however, Davis was not present after defendant actually began to work on plaintiff. After Macsenti came in, Teague and Davis took him into cubicle 2, Davis draped him with a cloth in the chair and gave him medication. Davis put the nitrous oxide on him, turned it on and they left Macsenti there. *Id.* at 346. At 1:00 p.m. Ms. Davis took the nitrous oxide off of Macsenti, sat him up, and gave him another pill. *Id.* at 347. Shortly after that, plaintiff Macsenti was laid back down, and Dr. Becker and Teague began the procedure on him, which consisted of doing dental implants. *Id.* The first part of the procedure went well but was "just slow going." *Id.* at 348. When Dr. Becker started the second post holes, he pushed away from the

patient. Dr. Becker had rollers on his chair and he "pushed away from the patient . . . pushed away and passed out . . . he pushed away and dropped the drill. He was just out cold." *Id.*

Teague said that she was stunned and did not know what to do. Dr. Becker was out for a while, ten minutes or so. He woke up and started the procedure again. *Id.* Defendant Becker used the drill again on Macsenti, and did not re-sterilize it before he used it on him. He started again, but he did not last long because he passed out again. *Id.* at 349. He woke back up and started again and passed out again. Teague said that she shook defendant, woke him up and asked him to step out in the hall. *Id.* at 349-50. To this point in time, defendant Becker had passed out about three times. Becker's appearance at this time was that he was staggering and as he got up to leave, he fell and knocked the tray off. Plaintiff Macsenti was still on nitrous oxide. Teague said that in the hall she had a conversation with defendant Becker, telling him she was concerned for him and the patient. She testified that defendant Becker said he was tired, that he had stayed up all night and was writing a thesis. *Id.* at 350. Ms. Teague said that defendant Becker assured her everything would be all right and they went back in and Teague picked up the equipment on the floor and got more sterilized packages and they started the procedure again.

Defendant passed out again, and this happened several times. *Id.* at 351. Teague asked Ms. Callaway, the receptionist, where Heather Davis was, and was told that Davis and Mrs. Becker had left and were in Oklahoma City. Teague asked Ms. Callaway if Becker had any medical problems such as diabetes or if he was on drugs, but Ms.

Callaway did not know and said that this condition had never happened before. *Id.* at 351-52. At these times, plaintiff Macsenti was still on nitrous oxide. Every time they started the procedure again, defendant Becker would pass out. Ms. Teague said that her idea was that Dr. Becker passed out or fell asleep "10 or 15 times . . ." *Id.* at 352. This was all while plaintiff Macsenti was on nitrous oxide. *Id.* At about this time Dr. Becker's daughter came to the office for some money, and Teague sent her to get some coffee for Dr. Becker. Teague put Dr. Becker in cubicle 1, and he went to sleep there for approximately 30 minutes. *Id.* Teague shook Becker to wake him up, spilled some coffee on him, and Becker "giggled" at Teague.

Dr. Becker had a problem with his headlight about 3:30 or 4:00 p.m. Teague testified that she had a conversation with Dr. Becker's wife on the phone, explaining to her that Dr. Becker was literally passing out, and Mrs. Becker told Teague that she should handle the problem, that Heather Davis was on the way. *Id.* at 356. Teague turned down what she believed was the nitrous oxide. Dr. Becker had problems, apparently, with the drill. *Id.* at 357. He then said he would be right back, and got up and walked out. Ms. Callaway went out the back door to the parking area looking for Dr. Becker, and she came back in and told Teague that Dr. Becker's car was gone. Macsenti was still on nitrous oxide. *Id.* at 358. The departure of Dr. Becker occurred at approximately 6:00 p.m. At around that time Callaway and Teague were discussing what they should do. Callaway then went outside and Dr. Becker's car was there but he could not be found.

Later Becker came back with another gentleman, and at this time plaintiff Macsenti was still on nitrous oxide.

Teague and defendant Becker began the procedure again. Heather Davis came in and asked Teague if she was tired and she answered that she was. Teague explained to Davis what had been happening to Dr. Becker. Davis told Teague she could go home, and she left about 8:00 in the evening. *Id.* at 360. On cross-examination, Ms. Teague testified that Macsenti had the nitrous oxide mask off that afternoon when he went to the men's room and also when he was given medication at 1:00 p.m. *Id.* at 367. On cross-examination Ms. Teague restated her testimony that defendant passed out for some ten minutes and one time he was asleep thirty minutes, and Teague was asked whether she saw these instances some 10 to 15 times, and replied: "Yes, sir." *Id.* at 371.

It is undisputed that Dr. Becker left the office around 6:00 p.m. to appear in municipal court on a charge of driving under suspension, even though plaintiff was still in the chair and the procedure had not been completed. When defendant drove back to his office from the court appearance, he was detained by the police and taken to the station to be booked on a new charge of driving under suspension. He finally returned to the office after 7:00 p.m. and completed plaintiff's procedure. Plaintiff was finally released about 9:00 p.m.

Plaintiff Macsenti testified that he now lives in Escalon, California, having lived earlier in Weatherford, Oklahoma. II App. 527. Macsenti was having some difficulty with one tooth that had "gone bad" on him in June of 1996. He learned about defendant from a phone book ad and called his office. After some delay, he had a brief visit that night with Dr. Becker who told him about root implants. *Id.* at 531. It was agreed he would return to California and would call for an appointment when he returned. The appointment was

scheduled for July 15, 1996 and Macsenti arrived at Dr. Becker's office a little before 9:00 a.m. *Id.* at 534.

He was given some medications by Dr. Becker's stepdaughter, Heather Davis. *Id.* at 534. His memory was poor about the events that followed. He had some sensations of a jarring that got his attention, a pinching on his lip, and a hurting. *Id.* at 535. He remembered some conversations about coffee and some giggling at some point. *Id.* at 535.

Macsenti remembers leaving the doctor's office and the next thing that stands out in his memory was a comment that it was 9:00 and Macsenti asked someone "is that real?" II App. 536. He remembered shaking his head and getting in the back of a car. He was told that it really was 9:00. *Id.* at 536. He remembers being given no parting instructions from Dr. Becker's office and no explanations why he had been there for some 12 hours. *Id.* Macsenti was frightened because he did not know what happened to him that day and slept in a chair because he was afraid to lay his head down. *Id.* at 537-38.

Macsenti did not return to work until Saturday following the Monday dental procedure. He did not feel well and had noise in his head and could not concentrate. II App. 541. Later he went to see Dr. Beller and then Dr. Aaron. *Id.* at 541-42. There he complained of being dizzy, light-headed and off balance. *Id.* at 544-45. He later saw Dr. Ernest Warner, who examined him, and he then had tests done at Baptist Hospital, a blood test and a MRI or CT scan. He later saw Dr. Whatley who conducted some neuropsychological testing. After this he moved to California. *Id.* at 548.

Macsenti testified that after his dental surgery he was having problems and fearful to do jobs. *Id.* at 562. He became fatigued easily. Since the July, 1996 dental surgery with Dr. Becker he has difficulty in building structures and does not have the physical stamina he had earlier for his carpentry work. At times he builds a structure and then a couple of days later his thinking process would go back to start "from scratch again." *Id.* at 568. On visiting Dr. Aaron on August 2, plaintiff related that he was dizzy, light-headed and off balance. *Id.* at 572. He related to Dr. Simon three days later that he was not in discomfort. On August 28 on revisiting his family doctor, Dr. Aaron, he reported dizziness and feeling as though he had the flu at times. II App. 572. When he visited a Dr. Stephen, a dentist at a Putnam City dental group, plaintiff said he was in "good" health on the questionnaire. *Id* at 573.

Macsenti saw Dr. Ernest Warner on September 5, 1996 and reported that he could not figure out the construction of "dados," joints used in construction, and he had to read instruction material several times because of trouble concentrating and retaining what he has read. *Id.* at 576. In a journal that Macsenti prepared within a week after July 15, 1996 he recorded numerous times that he was dizzy, off balance and was "scared" because he did not know what was wrong with himself. *Id.* at 578.

In support of his claim of injury by Dr. Becker's procedure, plaintiff offered testimony of Dr. Ernest G. Warner, Jr. Dr. Warner is a neurologist who has had experience in that field since 1961. II App. 600. He practices at Baptist Hospital in Oklahoma City, *inter alia.* His work includes being the medical director of Baptist Rehabilitation

Unit where he works with people with brain damage. *Id* at 601. He explained that a hypoxic injury results from too little oxygen being in the blood for the brain. From the history given by plaintiff, Dr. Warner had an opinion within a reasonable degree of medical probability that Macsenti received hypoxic insult or brain damage as a result of the July 15 procedure. *Id.* at 604-05. Macsenti's problems and his brain injury were consistent with other hypoxic brain injuries which Dr. Warner had treated. *Id.* at 608.

Dr. Warner noted that Macsenti had received halcion and mepergan fortis, which is a combination of demerol and phenergan. II App. 608. All three drugs are sedatives. The dosage of halcion received by Macsenti was more than Dr. Warner would "certainly prescribe." *Id.* at 609. Dr. Warner said that he would not give a patient mepergan fortis and halcion at one time as administered to Macsenti. *Id.* at 610. Dr. Warner said that Macsenti has mild brain damage with which his complaints were consistent. *Id.* at 616-17. He has been improving but Dr. Warner testified he did not believe the condition would ever clear up completely. *Id.* at 618. Macsenti suffers from depression, was confused and slow in thinking. *Id.* at 622-24. Dr. Warner agreed that Macsenti's illness could have existed before he saw Dr. Becker. *Id.* at 629.

In response to plaintiff's experts, Dr. Sullivan and Dr. Warner, defendant offered testimony by his experts including Dr. Thomas Whitsett. He is a physician on the faculty of the University of Oklahoma College of Medicine. III App. 839. Dr. Whitsett sees a few private patients. He testified concerning a textbook of internal medicine by Harrison, and a statement that hypoxia, the medical term for reduced oxygen

in the blood, rarely if ever causes permanent damage to the nervous system. *Id.* at 840. He opined that diffusion hypoxia is said to occur primarily in people breathing a low level of oxygen, 21% or less, and if they are breathing higher levels of oxygen as in Macsenti's case, diffusion hypoxia does not occur. *Id.* at 844. Referring to an article found in Dr. Warner's files, tests were reported on a mixture of 50% nitrous oxide and 50% oxygen which produced no evidence of diffusion hypoxemia. *Id.* at 849. From a test at 79% nitrous oxide and 21% oxygen (such as was breathed in the courtroom) there was a modest amount of diffusion hypoxia. *Id.* at 850. The medications under discussion can depress the central nervous system. Dr. Whitsett said that use of merpergan fortis and halcion in a dental setting was appropriate. *Id.* at 854. Dr. Whitsett said that he had reviewed the dosages Dr. Becker used on July 15, 1996 and they were not improper overdoses. *Id.* at 856-57. He felt that the drugs were safely given together in those dosages. He said that he thought that Dr. Warner and Dr. Sullivan were way off the scientific base in concluding that halcion, mepergan fortis, and nitrous oxide, administered in combination over a period of time, caused Macsenti to suffer hypoxic insult. III App. 890-91.

On cross-examination, Dr. Whitsett stated that he had never treated or examined Macsenti, had not reviewed his dental x-rays, and had not reviewed any training or emergency protocols at Dr. Becker's office. *Id.* at 874. Dr. Whitsett had not performed any dental implant surgery or provided any anesthetic services of the nature used for a patient in a dental implant procedure. He conceded that Dr. Becker leaving his patient at about 6:15 on July 15, 1996 to go to traffic court was an irregular thing to do. *Id.* at 875. It

was inappropriate to leave Macsenti in the hands of the assistant who was on the job for her first day and an insurance clerk. *Id.* at 876-77.

Defendant also presented testimony by a clinical psychologist, Dr. David Edwin Johnsen. He said that he has been a licensed psychologist since 1989 in Oklahoma. A psychologist typically deals with a variety of psychological and psychiatric disorders. III App. 900-901. His graduate training focused on neuropsychology which is the study of brain behavior relationships. *Id.* at 901.

Dr. Johnsen had reviewed records of Mark Macsenti and a neuropsychological evaluation performed by Dr. Whatley at the defendant's request. He did not personally meet or test Macsenti. *Id.* at 902. He reviewed the test score data and Dr. Whatley's report. From the review of the data Dr. Johnsen opined that there were areas of dysfunction that appeared to be occurring with Macsenti which appeared relatively mild in severity. III App. 905-06. A mild dysfunction means that it is difficult for the person to perform a certain task. Macsenti had mild memory difficulties and some visual, perceptual and attention difficulties noted on certain tests. On the Conners' Continuance Performance Test, Macsenti was in the impaired range. *Id* at 907. He did well on other tests including ability to perform mental arithmetic, conception, *et al.* "within the average range." *Id.* at 907. The indication is that he had a "mild problem" as opposed to a severe problem. Macsenti performed within the average range on a picture puzzle test and was able to perform a block design subtest. *Id.* at 909.

Dr. Johnsen further testified that such problems could be produced by old injuries to the head or exposure to inhalants. Mild impairment such as Macsenti had could have possibly preexisted July 15, 1996. *Id.* at 911. The mild impairment identified may have had an effect in terms of speed at which Macsenti is able to perform work he has been doing. From the data he saw nothing to indicate he is incapable of performing his activities but it might just take him longer to do them. *Id.* at 912.

Dr. Johnsen saw no evidence of malingering by Macsenti. III App. 925-26. Macsenti's test results are consistent with somebody who has suffered hypoxic insult. Dr. Johnsen did not know the cause of such hypoxic insult. He found Macsenti's test results to be mild in brain impairment which was still brain impairment. *Id.* at 926. Macsenti did poorly on a test requiring shifting back and forth between different tasks, which was one of the tests he did most poorly on. *Id.* at 927. Macsenti appeared to be mildly depressed. *Id.* at 929. Any disagreement between Dr. Whatley and Dr. Johnsen was as to the degree of impairment. Macsenti has some dysfunction based on Dr. Johnsen's review of the tests. *Id.* at 929-30.

Defendant's evidence concerning the events of July 15 contrasted sharply with plaintiff's evidence on several major points. For example, both defendant and Heather Davis (who was defendant's step-daughter as well as having been his dental assistant for several years) testified that she was present and assisting defendant during the procedure. Davis denied that defendant passed out during the procedure. III App. 820. Defendant testified that it would not have been possible for him to have completed the procedure had he been under

sedation, falling asleep, or drunk. *Id.* at 988-89. He said that Teague and another former employee who had testified that he passed out during plaintiff's procedure had not told the truth. *Id.* at 1007-09. Defendant attributed the length of the procedure to equipment problems he experienced during the day and plaintiff's failure to pre-medicate.

Further evidence will be discussed as necessary for our analysis of the legal issues raised on appeal.

II

Defendant's first argument is that the district court committed error by admitting expert evidence on the contested issue of causation without first having made threshold determinations that the testimony was reliable and would be helpful to the jurors, an argument based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendant did not object to the testimony when it was admitted during trial. He raised his *Daubert* argument after the close of all the evidence by a motion to strike Dr. Sullivan's testimony about diffusion hypoxia, and by a motion for judgment as a matter of law, presented also at the conclusion of all of the evidence. III App. at 1033-34. Consequently, we will review the admission of the expert testimony only for plain error. *See Goebel v. Denver & Rio Grande W.R.R.*, 215 F.3d 1083, 1088 n.2 (10th Cir. 2000).

Defendant's attack is focused primarily on the testimony of Dr. Stephen Sullivan, a professor of oral surgery at the University of Oklahoma and a practicing dentist. Dr. Sullivan teaches pain and anxiety control to dentistry students, as well as oral surgery. He deals specifically with the areas of

anesthetics that can be used in dental procedures. III App. 655. He does quite a bit of dental implant surgery in his practice. *Id.*

Dr. Sullivan's opinion was that plaintiff had suffered brain injury from diffusion hypoxia,[1] with the use of multiple drugs, III App. 679, 689-90, and that the diffusion hypoxia resulted from the combination of medications administered to plaintiff, which he described as "absurd," in combination with prolonged use of nitrous oxide.[2] *Id.* at 664-65. Dr. Sullivan testified that administering the medications given and nitrous oxide was below the accepted standard of care for such a case. *Id.* at 668. Leaving the building and plaintiff during the procedure was grossly negligent conduct. *Id.* at 684. Dr. Sullivan said that the plaintiff had been given four central nervous system depressants,[3] and that a depressed respiration rate and shallower breathing were well known effects of central nervous system depressants.

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[1]Hypoxia is defined as the "reduction of oxygen supply to tissue below physiological levels despite adequate perfusion of the tissue by blood." *Dorland's Illustrated Medical Dictionary* 812 (28th ed. 1994). Diffusion is described as "the process of becoming diffused or widely spread . . . ." *Id.* at 466.

[2]Nitrous oxide is defined as an "odorless gas that is a weak inhalational anesthetic . . . ." *Id.* at 1140.

[3]The medication having the trade name of mepergan fortes is a combination of two drugs. As noted earlier, plaintiff was also given the medication known as halcion.

Dr. Sullivan's credentials are not challenged. Defendant focuses his attack on the absence of professional literature to support his opinion and asserted conflicts between portions of Dr. Sullivan's reasoning and principles which do find support in the professional literature. Defendant's positions disputing Dr. Sullivan's opinions were energetically developed at trial through cross-examination of Dr. Sullivan and through the testimony of defendant's own experts, *inter alia*.

On careful review of this record, we find no plain error such as to excuse a timely *Daubert* objection to plaintiff Macsenti's expert testimony. We are convinced that Defendant forfeited the opportunity to subject the expert testimony of Dr. Sullivan and plaintiff's other experts to a *Daubert* challenge by failure to make a timely objection before that testimony was admitted. After rejecting the "general acceptance" standard long applied from *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923), *Daubert* concluded:

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands. 509 U.S. at 597; *see also Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999). Thus the trial judge is assigned the task of insuring that an expert's testimony rests on a reliable foundation and is relevant, but *Daubert* does not

mandate an inquiry questioning and challenging the scientific proffer absent a timely request by an objecting party.

It is true that in *Hoult v. Hoult,* 57 F.3d 1, 4 (1st Cir. 1995), the First Circuit observed that "we think *Daubert* does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection. We do not think, however, that district courts are required, *sua sponte*, to make explicit on-the-record rulings regarding the admissibility of expert testimony." *Id.* at 4-5. The First Circuit added that "rather, we assume that the district court performs such an analysis *sub silentio* throughout the trial with respect to all expert testimony." *Id.*

We note that there are other circuit opinions that have reached the same conclusion as we do - namely that a decision to admit expert opinion evidence will be reviewed only for plain error when objections under *Daubert/Kumho* are not timely made. In *Christopher v. Cutter Laboratories,* 53 F.3d 1184 (11th Cir. 1995), the Eleventh Circuit dealt with problems similar to those in our record relating to *Daubert.* The court cited *Daubert* and said that "there is no question that several of [a medical expert's] statements, viewed in isolation, were statistically invalid and, as such, that the district court should not have admitted them." 53 F.3d at 1191.

However, in *Christopher* the court noted that with respect to the medical expert's testimony, it was very clear that the defendant made no objection that the evidence was statistically inaccurate, *id.* at 1192; that the defendant filed no motion in limine challenging the expert's proposed testimony; and that defendant did not raise any contemporaneous

objections. The Eleventh Circuit concluded that "in order to preserve this issue on appeal, [the defendant] must have objected to the challenged testimony."

Id. The court emphasized that If [the defendant] believed the medical testimony was statistically invalid, it should have objected to that testimony, giving [the witness] the chance to explain his answers. Objecting would also have provided the district court with the opportunity not only to make a ruling on the accuracy and admissibility of the challenged testimony, but also to clarify that testimony.

Id. The court held that absent an objection, it could review the challenged evidence only for plain error, which the trial judge did not commit.

The Ninth Circuit also issued a decision under *Daubert* which is persuasive here. *See Marbled Murrelet v. Babbitt,* 83 F.3d 1060 (9th Cir. 1996). There the district court had issued a permanent injunction enjoining Pacific Lumber Company from harvesting trees in an environmentally sensitive area. The logging was found to be a threat that would harass and harm the marbled murrelet and would cause a "take" of the birds in violation of the Endangered Species Act. Pacific Lumber appealed, arguing, *inter alia*, the evidence was insufficient as required proof of harm, principally that the proof failed to meet the standard for reliable scientific evidence under *Daubert*. *Id.* at 1066. The Ninth Circuit recognized that unreliable evidence is necessarily insufficient, but held that "the appropriate time to raise *Daubert* challenges is the trial. By failing to object to evidence at trial and requesting a ruling on such an objection, a party waives the right to raise admissibility issues on appeal." *Id.* at 1066.

The court noted that by failing to request a ruling in the district court on its *Daubert* objections, Pacific Lumber evaded the district court's decision on the issue and denied the Environmental Protection Information Center the opportunity to lay a better foundation for the evidence. *Id.* at 1067. The court held that permitting Pacific Lumber to challenge the reliability of the scientific evidence under *Daubert* on appeal, in the guise of an insufficiency of the evidence argument, would give Pacific Lumber an unfair advantage. The *Daubert* argument was rejected. *Id.* at 1067. We feel that the holding is most persuasive here where we have similar circumstances in that defendant Becker failed to make timely *Daubert* objections below, depriving the trial judge of the opportunity to make a *Daubert* analysis and denying plaintiff Macsenti an opportunity to support the reliability and relevance of his evidence by further proof and argument.

Our court discussed the admissibility of evidence in light of the *Daubert* and *Kumho* requirements in *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277 (10th Cir. 2000). We noted, *id.* at 1289, the Supreme Court's statement in *Daubert* that even after evidence is initially admitted, "in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . ." 509 U.S. at 596. We said, however, that we did not read this statement in *Daubert* as overriding the general requirement of a timely objection to the evidence and that a "party may waive the right to object to evidence on *Kumho/Daubert* grounds by

failing to make its objection in a timely manner." 201 F.3d at 1289-90.[4]

Later in *Goebel v. Denver and Rio Grande W.R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000), this court dealt again with the *Daubert/Kumho* issue. On that record we held that there was an abuse of discretion in admitting expert testimony because of the lack of *Daubert* analysis and findings on admissibility. However we made it clear that:

We specifically hold that a district court *when faced with a party's objection,* must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper. *Id.* at 1088 (emphasis added and footnote omitted). Thus we did not hold that a *Daubert* analysis was required *sua sponte* but noted that enforcement of the requirement for the *Daubert* analysis was premised on "a party's objection." *Cf. United States v. Velarde,* 214 F.3d 1204, 1209 (10th Cir. 2000) (abuse of discretion to admit expert testimony where the record revealed no *Daubert/Kumho* reliability determination although *Kumho* was specifically called to the trial court's attention).

Here the *Daubert* objection to expert testimony, specifically that of Dr. Sullivan, was made at the *close* of evidence, as Appellant's Opening Brief, p. 29-30, specifically states. Counsel for defendant Becker *after* conclusion of the evidence there said he had two motions, one a *Daubert*

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[4]Our rejection of the *Daubert* argument in *Questar* was actually based on the fact that Questar did not show that the witness's testimony was offered as expert testimony. *Id.* at 1290.

motion to exclude all the evidence of Dr. Sullivan about diffusion hypoxia because it "flies in the face of all scientific knowledge literature about it." III App. 1033. The other motion was for judgment as a matter of law in favor of the defendant, this being presented immediately after the motion to exclude Dr. Sullivan's testimony on diffusion hypoxia. The trial court denied the motions. *Id.* at 1034. The judge addressed the request to exclude Dr. Sullivan's testimony under *Daubert*, stating: "I think the time to make that motion is before he testifies." *Id.* at 1033.

We are convinced that the motions were untimely here.[5] By waiting until after the close of all the evidence to raise the *Daubert/Kumho* objection, basic errors occurred. The proponent of the evidence was deprived of the opportunity to offer other supporting proof from Dr. Sullivan and from literature. Moreover the trial judge was disadvantaged in that she was not alerted to the need of stating *Daubert/Kumho* findings and analysis. And, obviously, appellate review by us is impaired as well, due to the inadequacy of the record. Accordingly on this record and

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[5]Defendant seems to try to justify his failure to make contemporaneous objections at trial on the *Daubert* issue by asserting that he was surprised by a change in Dr. Sullivan's theory, his testimony at trial allegedly being in conflict with testimony he had previously given before the Oklahoma Board of Dentistry. On its face, however, this rationalization fails: If the testimony was unexpected and a departure from the witness's previously expressed opinion, that would seem to amplify the motivation to raise the issue at once. Objection should have been made *at the latest* when the allegedly new and different explanation was given at trial.

persuasive precedent we hold that the *Daubert/Kumho* objection was waived, and our review is only for plain error.

This would have given the trial judge the opportunity to evaluate the basis of the testimony and would have given the plaintiff the opportunity to provide further foundation for the testimony. We also note that defendant had taken Dr. Sullivan's deposition before trial and explored the basis for his opinion, *see* III App. 692-93, and in opening statement characterized Dr. Sullivan's theory as "junk science," II App. 328. In short, we are not convinced that defendant was surprised by the trial testimony, but in any event nothing excuses the failure to make timely objection at trial.

On careful review of this record, we find no plain error in the rejection by the trial judge of the belated *Daubert* objection. Dr. Sullivan's general theory was that the injury here resulted from the excessive combined use of central nervous system depressants. His opinion on the specifics of this case, in the absence of published studies on this precise combination of medications and prolonged use of nitrous oxide, was not so manifestly unreasonable that its admission constituted plain error. *See Christopher v. Cutter Laboratories,* 53 F.3d at 1192.

III

We next address defendant's contention that the judgment entered on the jury verdict gave plaintiff an impermissible double recovery. The verdict form separately asked the jurors if they found for plaintiff or for defendant on the plaintiff's theories of negligence and intentional infliction of emotional distress, and separately asked the amount of

damages on each theory. In her charge on damages, the judge instructed the jury, *inter alia,* that:

> The plaintiff has asserted two separate claims for damages under different legal theories. The Court has given you separate instructions on these legal theories and provided you with a verdict form on which you must indicate your decision on each claim. However, plaintiff may only recover once for any one item.

I App. 126. The jury found for the plaintiff on both the negligence and intentional infliction of emotional distress theories and set the damages at $500,000 on each.[6]

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[6]The verdict filed in this case read as follows in pertinent part (I App. at 136-137):

> Verdict Form
>
> I.
>
> We the jury, duly empaneled and sworn in the above entitled cause, do, upon our oaths, as to plaintiff's negligence claim, find:
>
> _X_ For plaintiff Mark Macsenti and against defendant Jon D. Becker and award him damages in the amount of $500,000.
>
> -OR-
>
> ___ For defendant Jon D. Becker and against plaintiff Mark Macsenti.

The form of judgment entered by the clerk (*see* Fed. R. Civ. P. 58) listed these decisions separately, along with the jury's award of $300,000.00 in punitive damages. The parties construe this as a judgment for $1.3 million, and we agree because it is clear by the district judge's post-trial order and her comments in the record that the trial judge also thus

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II.

We, the jury, duly empaneled and sworn in the above entitled cause, do, upon our oaths, as to plaintiff's intentional infliction of emotional distress claim, find:

_X_ For plaintiff Mark Macsenti and against defendant Jon D. Becker and award him damages in the amount of $500,000.

-OR-

___ For defendant Jon D. Becker and against plaintiff Mark Macsenti.

(To be completed only if you award plaintiff damages in Section I or II above)

We, the jury duly empaneled and sworn in the above entitled cause, do, upon our oaths, find in favor of the plaintiff Mark Macsenti as follows:

2. We do_X_ do not ___ (check one) find by clear and convincing evidence that the defendant, Jon D. Becker, acted in reckless disregard of the rights of others.

June 12, 1998

Date

construed the verdict and judgment.[7] Defendant now contends

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[7]After the verdict for the damages of $500,000 on both the negligence and intentional infliction of emotional distress claims were returned, *see* note 6, *supra*, there were some discussions by counsel in chambers with the trial judge. In proceedings that followed in open court but out of the presence and hearing of the jury the judge stated:

THE COURT: I think we need to redo on the record the discussion we just had in chambers beginning with Mr. Dawson's argument that the verdict actually is-should be construed as a verdict of $500,000 rather than $1 Million, to which plaintiffs object. Is that a fair statement?

MR. OLSON: That's correct, your Honor.

THE COURT: It's my opinion that the instructions on damages tell them that they cannot award -- that plaintiff may only recover once for any one item but they are to indicate their decision on each claim. To me, that clearly results in the $500,000 being imposed twice, once for each cause of action. I have offered to submit an interrogatory to the jury to make certain that is their intent in case they misconstrue these instructions, and Mr. Dawson has objected to them. In the face of his objections, I will not do it. Is that a fair statement, Mr. Dawson?

MR. DAWSON: Yes, your Honor.

IV App. at 1074. As explained in the text, we agree with the trial judge's construction of the verdict, namely, that the verdict, in light of its form and the instructions given to the jury on damages, shows

that it was error to add the two amounts of $500,000 in actual damages on the two theories of negligence and intentional infliction of emotional distress. Defendant says that there was no proof of different injuries to support recovery on both theories and insists this is a double recovery. We disagree.

We do not believe that the verdict here is inconsistent on its face. Consequently, we agree with the district court's analysis of this issue. The trial judge, noting that there was no contention of improper or inadequate instructions to the jury, concluded that the double recovery argument fails because courts "must assume that the jury performed its duty in accordance with those instructions." Dist. Ct. Order at 4, I App. 303. The jury here was properly instructed to avoid granting a double recovery by awarding recovery only once for each item of injury. We see no error in the district court's conclusion that the jurors followed the instructions and found separate injuries arising from the negligence of the defendant and from the intentional infliction of emotional distress by him.

Defendant also contends that there was no evidence of distinct injuries on which the separate verdicts for damages for negligence and intentional infliction of emotional distress could properly have been based. This argument is without merit. Plaintiff produced evidence that he had suffered brain damage as a result of negligence as discussed in Part II,

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clearly the jury's intent to award recovery for the plaintiff of $500,000 on each of the two claims, one for negligence and one for intentional infliction of emotional distress.

supra. Plaintiff's evidence of severe emotional distress is discussed *infra* in Part VI. We conclude that the jurors could have found separate injuries from the negligent performance of the dental procedure and from the outrageous and reckless acts which added severe emotional distress to the underlying injuries. Because we conclude that the jurors could have found distinct injuries, we, like the trial judge, construe the verdict as evidence that they did so.

In sum, then, we hold that there was no error in construing the jury's decision as a verdict for one million dollars in compensatory damages, and we hold that the evidence was sufficient to support that verdict.

IV

Defendant contends that the trial court erred in denying his motion for a new trial because the verdict was against the weight of the evidence and was a result of passion and prejudice caused by the erroneous admission of irrelevant and unfairly prejudicial evidence. The contention that the verdict was against the weight of the evidence is patently without merit when the evidence is viewed in the light most favorable to the plaintiff, which of course is the proper standard of review. Accordingly, we turn to the contention that defendant was unfairly prejudiced by erroneous rulings on the admission of evidence. We review the district court's evidentiary rulings for abuse of discretion and will reverse only if we have a firm and definite belief that the trial court made a clear error in judgment. *See Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1433 (10th Cir. 1993).

A

The first testimony of which defendant complains was that of Ms. Holly Stratton, a former dental assistant for defendant, who testified that on July 3, 1996, twelve days before plaintiff's treatment, she came to work in the morning and found defendant asleep in a dental chair with a nitrous oxide mask on his face. Stratton had worked for defendant for about five years, but July 3, 1996, was her last day in his employ. Stratton testified generally that defendant kept irregular office hours and sometimes canceled patients' appointments. She also testified that she twice had to drive patients home, but no explanation of these occasions was given because the trial judge sustained defendant's objection to further testimony on this topic on the basis that the events were too remote in time.

We will consider these three topics of testimony by Stratton in reverse order. As to the last, we see no abuse of discretion. The trial judge sustained defendant's objection, preventing plaintiff from eliciting the specifics of the instances. Thus, we are left with the mere testimony that within the last two years of her employment, Stratton twice had to drive patients home, testimony which defendant did not move to strike. We do not see an abuse of discretion in the mere fact that the trial judge did not *sua sponte* strike this tidbit of evidence. Moreover, even if there were an abuse of discretion, because of the minimal amount of information conveyed to the jury, the error would no doubt be harmless. *See* 28 U.S.C. § 2111.

In ruling on defendant's motions in limine prior to trial, the district judge had indicated, without explanation, that

she would allow evidence of irregular business practices by defendant going back to 1992, four years before the date of the procedure in question. Plaintiff has offered no argument in support of the ruling on the evidence of irregular hours and canceled appointments going back so far. Nevertheless, this snippet of evidence was quite inconsequential in the context of this trial. Accordingly, we conclude that any abuse of discretion in this regard was at most harmless. *Id.*

As for the evidence of Stratton's observation of defendant apparently wearing a nitrous oxide mask on the morning of July 3rd, we infer that the trial judge viewed this evidence as coming within her ruling about erratic or unusual behavior. At the beginning of trial, the judge had announced this ruling on defendant's motions in limine: "Any erratic or unusual behavior, however, immediately before the event - and I'm talking about no more than two weeks before the event - is relevant and admissible." II App. 338-39. Defendant contends, however, that this evidence was completely irrelevant and unfairly prejudicial.

In arguing that the evidence was irrelevant, defendant takes the position that only evidence of events occurring on the day of plaintiff's appointment should have been admitted. Defendant also refers to an argument made in the trial court by plaintiff that this evidence, and similar evidence, was admissible to show knowledge of co-defendant Heather Davis that defendant Becker was unfit to attempt to perform the procedure on plaintiff on July 15, 1996. Defendant states that the failure to prove a case against Davis undermines this rationale. This point is unpersuasive. Other than arguing for the exclusion of the evidence altogether, defendant cites no other relief he sought from the trial court to mitigate the

alleged unfair prejudice. We do not think that the ultimate failure of plaintiff's case against Davis could result in the retroactive nullification of the rationale for admitting evidence to support the plaintiff's claim against her.

We are left with defendant's argument that the evidence should have been excluded because its potential for unfair prejudice substantially outweighed its probative value. Like other evidence discussed *infra*, the incident with the nitrous oxide mask may be generally described as evidence of other bad acts. We note that neither party cites Fed. R. Evid. 404(b), nor are the principles of that rule discussed in any of the briefs. We must infer that the judge felt the evidence admissible under the broad latitude for admission of proof staked out in Rule 404(b) since the judge did not articulate the bases for her rulings on the challenged evidence. We see no abuse of discretion in this evidentiary ruling.

It appears the trial judge determined that this evidence was relevant to plaintiff's theory that defendant was either under the influence of some type of drugs or medication or was experiencing symptoms of withdrawal. We note that defendant apparently did not request a limiting instruction to the effect that this evidence was to be considered only against Davis, nor did he move to strike the testimony after the trial judge had granted judgment as a matter of law in favor of Ms. Davis at the conclusion of the plaintiff's evidence. On balance, then, we find no abuse of discretion by the trial judge in admitting the testimony.

B

We will next address defendant's challenge to the testimony of two Clinton police officers concerning their encounters with defendant Becker. First, Officer Alan McCormick testified that he stopped defendant for driving under suspension on the evening of July 15, 1996. This occurred when defendant left his office, before the procedure being performed on plaintiff had been completed, to make a scheduled appearance at municipal court on a previous charge of driving while under suspension of his license. After the court appearance, a police dispatcher saw defendant getting into his car to drive away and reported this apparent violation. Officer McCormick responded to the report, spotted the red vehicle that had been reported, and began following it. After getting close enough to the red car to identify the defendant as the driver, Officer McCormick turned on his lights to signal him to stop. Defendant did not stop but drove on until he reached his office, about seven blocks from where the officer had begun signaling for him to pull over.

At this point, Officer McCormick said that he approached defendant as he got out of his car and asked to see his driver's license. McCormick testified that defendant produced a credit card instead. McCormick then got defendant to admit that he did not have a valid driver's license. McCormick testified that defendant appeared very sleepy, was unsteady on his feet, and his speech was slurred. McCormick said that he recognized these as possible signs of impairment from alcohol or other drugs. Defendant was then taken to the police station where he was held until he could post bond for the charge of driving under suspension. According to McCormick, defendant never mentioned that he

had interrupted plaintiff's procedure and needed to attend to plaintiff.

McCormick further testified that while being booked defendant was required to remove his shoes and that he had to be assisted to keep from falling while doing this. Finally, McCormick opined that defendant was "under some type of intoxicant" at the time, although there was no detectable odor of alcohol. As defendant was leaving the police station, McCormick told him that he had a problem and needed to get some help; defendant was angered by the comment and "just exploded." II App. 427

We see no merit in defendant's contention that this entire episode was irrelevant. Officer McCormick's observations about defendant's condition about the time that he was performing the implant procedure are very clearly relevant to plaintiff's allegations of negligent and reckless behavior. Defendant specifically contends, however, that the comment about defendant having a problem and needing help was irrelevant and prejudicial. Defendant did not object at trial to this comment, however, and we certainly do not think the additional prejudice from this comment rises to the level of plain error.[8]

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[8]We find no merit in plaintiff's contention that defendant waived all objections to all of this and other similar testimony by not making a contemporaneous objection at trial. The trial judge made it clear at the start of trial that she would permit evidence of encounters with the police which occurred within two weeks before the date at issue.

Officer Mike Copeland testified on plaintiff's behalf regarding an encounter he had with defendant on July 11, 1996, four days before plaintiff's implant procedure. Officer Copeland was responding to a call from the residence of another Clinton police officer, Officer Kelly. On arriving at Kelly's home, Copeland observed Kelly on his front porch talking with another man. When Copeland sounded his horn, the other man approached his car, and Copeland recognized the man as the defendant. He testified that defendant was staggering as he walked and, when they began conversing, defendant's speech was slurred. Copeland asked defendant if he had been drinking, which defendant denied. Officer Copeland said that defendant's eyes were dilated. Copeland told defendant the he was "taking him into custody on a complaint of public intoxication by other means other [sic] than alcohol." II App. 484. He also stated that it was his opinion that defendant was "impaired on something other than alcohol." *Id.*

There is no statement in our record of the judge's basis for her ruling admitting this testimony, nor does plaintiff in his appellate brief offer any reasoned basis to support the ruling. Defendant argues that the evidence was propensity evidence, inadmissible under Fed. R. Evid. 404(a), and also that its probative value was substantially outweighed by its potential for unfair prejudice, so that it should have been excluded under Rule 403. We conclude, however, that the admission of the evidence was at most harmless error.

In reaching this conclusion, we do not underestimate the potential for harmful prejudice from this evidence. Our task, though, is to apply the harmless error standard of 28 U.S.C. § 2111 by taking the evidence which was possibly

admitted in error in the context of all of the evidence. In that light, we are confident that any error in admission of this evidence was indeed harmless. The damning evidence of defendant's conduct on the date in question was so potent that the added effect of this evidence did not, we believe, affect defendant's substantial rights. 28 U.S.C. § 2111.

We recognize that the damning evidence of defendant's conduct during plaintiff's implant procedure was contested, and we have not overlooked the possibility that erroneously admitted evidence *could have* affected the jury's resolution of that conflict in the evidence. We conclude, however, that the jury was *not* so affected by this evidence of defendant's previous conduct. Defendant simply was unable to present a convincing explanation for some of the indisputable facts, such as the extraordinary length of the procedure and his poor judgment in leaving the office in the middle of the procedure. In the end, we are convinced that the jury would have resolved the conflicting evidence the same way and reached the same verdict even if they had not heard of the encounter with Officer Copeland.

C

Defendant contends that he was unfairly prejudiced by the admission of evidence of his personal medical records and medical history, including evidence of alleged drug use. This evidence came during the testimony of defendant's physician, Dr. Gary Hays. Dr. Hays testified that he treated defendant in February and March 1996 for injuries sustained in a motorcycle accident and that this treatment included prescribing medication for pain relief. Defendant also came

to Dr. Hays for help in his efforts to lose weight and Dr. Hays prescribed another medication for that purpose.

Our first step in considering challenges to evidentiary rulings is to determine whether the issue has been properly preserved. Fed. R. Evid. 103(a). This threshold question presents considerable difficulty here. Defendant first moved to exclude this evidence by a motion in limine before trial. As far as we can determine from our record, no ruling was made on the many subjects raised in the written motion until after opening statements had been given at trial. Then, in a conference while the jury was outside the courtroom, the district judge ruled on some of the motions and deferred ruling on the others. Apparently addressing defendant's medical records along with several other categories of evidence, the judge stated:

Medication and evidence of Dr. Becker using medication, all of those, I tell you now, they are granted until I vacate that, which probably will be vacated but I cannot tell from what's before me how much of that is relevant. Do not get into it without approaching the bench.

II App. 341.

During direct examination of Dr. Hays, plaintiff moved for admission into evidence of plaintiff's medical records maintained by Dr. Hays (in their entirety it appears). Counsel for the defendant objected and a bench conference was held. The court inquired about the relevance of evidence concerning the witness's treatment of defendant in March 1996. The explanation by plaintiff's counsel suggested that the evidence would be tied into evidence of a drug test performed

on defendant on July 11 or 12, 1996 (a test which is discussed further *infra*). Counsel for the defendant stated: "If you let - I think - well, we would want them in if you let the rest of them in." II App. 496. The judge then ruled all of the records admissible.

A party seeking to preserve for appeal an issue regarding admission of evidence must make a clear objection at trial. Fed. R. Evid. 103(a)(l). Although defendant had done so in his motion in limine, that was insufficient in this case. At the time defense counsel spoke, the only ruling in place was one which, although clearly tentative, was in his favor and barred all of this evidence. It is very difficult for us to discern the meaning of "we would want them in if you let the rest of them in." It appears, perhaps, that defendant intended to say that he would want all of the medical records to come in if the court was going to allow evidence of the results of a drug test reflected in the doctor's file. We will construe the record this way and conclude that defendant has preserved his objection to the evidence of the medications Dr. Hays had prescribed for defendant.

After the July 11 encounter with the Clinton police described in the testimony of Officer McCormick, defendant voluntarily submitted a urine sample for drug testing. The sample tested positive for the class of drugs including methamphetamine and for a possible opiate. Defendant's cross-examination of Dr. Hays brought out the fact or opinion that the medications prescribed for defendant could have caused these positive test results. We are of course aware that the terms methamphetamine and opiate are strongly suggestive of illegal drug activity. Nevertheless, we again

reach the conclusion that any error in the admission of this evidence was harmless.

As with Officer Copeland's testimony, we must address this evidence without the benefit of an explanation from the trial judge for her decision to admit the evidence and without any reasoned argument in plaintiff's brief to support the decision. Our remarks in Part IV-B, *supra*, regarding Officer Copeland's testimony are equally apt here. Without ignoring the potential prejudicial impact of this evidence, we simply are convinced that the properly admitted evidence made a case of such strength for the plaintiff that any error in the admission of this evidence did not affect the outcome of this trial.

V

A

Defendant contends that the trial court erroneously excluded evidence of past dealings between him, his wife, and the Clinton police department. He asserts that if admission of the evidence of encounters with the police (evidence described in Part IV-B, *supra*), was proper, then he should have been allowed to present evidence which would have supported his theory that the police had some vendetta against him, which would have cast doubt on the credibility of the police officers.

Our standard of review is abuse of discretion. Our review of this issue is severely limited by defendant's failure to make a meaningful offer of proof as to the nature of the evidence he wished to have admitted. This issue arose at trial when defendant asked Mrs. Becker if she had met Officer

McCormick in 1992. Plaintiff objected and a conference was held at the bench, outside the hearing of the jurors. When asked about the nature of the evidence he was attempting to elicit, counsel for the defendant stated:

Mr. Dawson: I'm going to talk about this incident, the first time she ever met him she was in the parking lot of the police department and he's banging on her window with his flashlight and she finally opens the door, he draws her out, throws her on the floor and -

The Court: When did this occur?

Mr. Dawson: In 1992. And I'm not going to go into other incidents but that this was the start of the problems since then and that as a result of that she was charged with four crimes and that they were all dismissed and settled and the police officer paid her $10 and from that point forward, they have been harassed by the Clinton Police Department. I'm not going into the other . . . events but this is the heated relationship between the Beckers and the policemen. This would give them motive to come into court and say things that aren't true and to arrest Jon Becker and falsely charge him with drug charges.

III App. 951. The court ruled that defendant could not develop this evidence of specific events so remote in time from the transaction at the heart of the case, but that the defendant could "in two questions or less" establish that there had been a "history of trouble" between the Beckers and the local police.

"Proof of bias of a witness is almost always relevant . . . ." *United States v. Abel,* 469 U.S. 45, 52 (1984). Nevertheless, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Here, we think the trial judge was well within her discretion in limiting the evidence defendant could offer to show the history of conflict between the Beckers and the police. It is likely that Officer McCormick's version of the events of 1992 would have been different from that of Mrs. Becker.[9] Thus, permitting the testimony would have created substantial problems, expanding the scope of the trial and quite possibly leading to confusion of the jurors. Under Rule 403 the ruling was not an abuse of discretion.

B

Defendant also asserts that the trial court erred in excluding evidence that plaintiff's attorneys had paid at least some of his medical bills. The trial judge apparently ruled that this evidence was inadmissible under the collateral source rule. In their arguments on this issue, both parties seem to assume that the Oklahoma doctrine of collateral source is applicable, and this is correct. As we have observed,

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[9]In response to defendant's argument, plaintiff's counsel warned of "opening up a Pandora's box" by going into the history of the relations between the police and the Beckers. He said that if the evidence were allowed, he would want to call three police officers in rebuttal. III App. 951.

The admissibility of evidence in diversity cases in federal court is generally governed by federal law. Nevertheless, it is well recognized that Congress did not intend the procedural rules to preempt the so-called "substantive" state rules of evidence, such as the parol evidence rule, *the collateral source rule*, or the statute of frauds; although the application of these rules will affect the admissibility of some evidence, they in reality serve substantive state policies regulating private transactions. *Blanke v. Alexander*, 152 F.3d 1224, 1231 (10th Cir. 1998) (citations omitted and emphasis added).

Defendant asserts that plaintiff's attorneys "paid or agreed to pay Macsenti's neurologists, two psychologists, and a therapist for his medical treatment." Appellant's Opening Brief at 43. Defendant contends that this information should have been admitted for two reasons: to show that the amount of medical expenses which plaintiff claimed as damages were inflated and to show bias of the expert witnesses. However, defendant has almost totally failed to provide an offer of proof which is necessary for our review of this evidence. *See* Fed. R. Evid. 103(a)(2). From a passing reference in the briefs, it appears that this topic was first raised in the district court by a motion in limine made by plaintiff. Defendant has failed to include this motion or any response thereto in the record on appeal. The judge made her ruling from the bench at trial without explanation. Because we do not know what arguments were presented to the district court, we cannot say that the court's rulings were not within its discretion.

We further note that defendant's argument that the alleged payments of expenses for medical treatment (as opposed to expenses of evaluation) are not within the

collateral source rule is unpersuasive. Defendant cites no authority for this proposition. While our research has not disclosed any authority holding specifically that payment of treatment expenses by an attorney is within the collateral source rule in Oklahoma, the language of the Oklahoma cases seems to support that view. *See Denco Bus Lines, Inc. v. Hargis,* 204 Okla. 339, 229 P.2d 560, 564 (Okla. 1951) ("the receipt of compensation by the injured party from a collateral source wholly independent of the wrongdoer would not operate to lessen the damages recoverable from the person causing the injury").[10]

VI

Defendant argues that the trial judge erred in permitting the jury to consider the plaintiff's claim for intentional infliction of emotional distress. In accordance with Oklahoma law, the district judge instructed the jurors that

[f]or plaintiff to recover from the defendant on this claim, he must prove by a preponderance of the evidence that:

> 1. The defendant's actions, in the setting in which they occurred, were so extreme and outrageous as to go beyond all possible bounds of decency and would be considered atrocious

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[10]We must also reject defendant's contention that the judgment should be reversed because of the prejudicial effect of the cumulation of alleged evidentiary errors. We have concluded that any errors were at most harmless in the context of the trial as a whole. Similarly, we hold that the cumulative effect of any errors was at most harmless.

and utterly intolerable in a civilized society; and

2. That the defendant intentionally or recklessly caused severe emotional distress to plaintiff beyond that which a reasonable person could be expected to endure.

The term "emotional distress" means mental distress, mental pain and suffering, or mental anguish. It includes all highly unpleasant mental reactions, such as fright, horror, grief, humiliation, embarrassment, anger, chagrin, disappointment, and worry.

I App. 121-22.

Defendant does not contend that this instruction is inaccurate as a matter of law, but instead maintains that the evidence failed to establish any of the enumerated elements of the claim. The suggestion that the evidence failed to show conduct of the outrageous character required for this claim is quite unpersuasive. We of course view the evidence in the light most favorable to the jury verdict. *See United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1226 (10th Cir. 2000). We are also mindful at the outset that "the outrageous or extreme character of conduct required may arise from an abuse of a position or a relationship which gives the actor actual or apparent authority over another, or the power to affect another's interest." *Breeden v. League Services Corp.*, 575 P.2d 1374, 1377 (Okla. 1978) (citing *Restatement (Second) of Torts* § 46 comment e (1965)). Here, defendant's position as plaintiff's dentist certainly was one of trust, especially so because for the duration of the treatment

plaintiff was under the influence of medications designed and administered to induce a state of "conscious sedation," in defendant's terminology.

The jury could have, and evidently did, decide that defendant was grossly impaired at the time he commenced the delicate dental surgery, to the extent that he lost consciousness as many as ten to fifteen times during the process. Nevertheless, he continued his attempt to complete the surgery, heedless of any danger posed by keeping the plaintiff sedated for such an unexpectedly, and unreasonably, long procedure. We see no merit at all in the contention that this evidence failed to meet the standard of extreme and outrageous conduct.[11]

Defendant also contends that the evidence failed to show that defendant suffered severe emotional distress. Defendant's characterization of the evidence is that plaintiff testified that he remembered little of what happened on the day of the procedure and only suffered distress from defendant's negligent administration of medications and nitrous oxide. Defendant points out that plaintiff did say that he was upset by his inability to perform the type of tasks that he previously done in his carpentry and construction work; defendant contends that this is simply too insignificant to constitute severe distress and draws a comparison to two

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[11]For the same reasons, we reject defendant's contention that the evidence was insufficient as a matter of law to support the award of punitive damages.

reported Oklahoma cases upholding intentional infliction of emotional distress claims.[12]

We conclude, contrary to defendant's assertions, that there was sufficient evidence that plaintiff suffered severe emotional distress. Under Oklahoma law the burden of proof that the plaintiff must bear to succeed on this claim may be partially met in the course of establishing the first element of the claim, the extreme and outrageous nature of the defendant's conduct. Thus, the Oklahoma Supreme Court has said that:

> The extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress episodes took place. Expert medical testimony ordinarily is not required where damages for emotional distress are present. In most cases, jurors from their own experience are aware of the extent and character of the disagreeable emotions that may result from a defendant's outrageous conduct. *Chandler v. Denton*, 741 P.2d 855, 867 (Okla. 1987).

We think this is a case in which jurors from their own experience could easily infer that severe emotional distress would be likely to follow from defendant's conduct, beginning with plaintiff's reaction to the realization that he had been sedated for an extended period of time without explanation. Upon finally being released to go home about

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[12]The cases are *Miller v. Miller*, 1998 OK 24, 956 P.2d 887, 901 (Okla. 1998), and *Chandler v. Denton*, 741 P.2d 855, 867-68 (Okla. 1987).

9:00 p.m. after the procedure, plaintiff was confused, unable to comprehend what had happened to him, according to the friend who drove him home. This witness testified that plaintiff kept saying, "'It can't be 9 o'clock. It can't be that late.' He just couldn't figure out what had happened to him that day. He said several times, 'What's happened?'" II App.438-39. Shortly after getting home, plaintiff called another close friend and asked that friend to come get him. When the friend asked where he was, plaintiff replied that he didn't know; the witness said that his telephone's "caller ID" feature revealed that the call had come from plaintiff's own home. *Id.* at 459-60. In the days following the procedure, plaintiff was described by this same friend as often appearing "shaken." *Id.* at 462.

Plaintiff himself testified that the night after the procedure he was frightened because he did not know what had happened to him. *Id.* at 537. He also testified that he slept very little, spending the entire night sitting up in a chair because he was afraid to lay his head down. *Id.* at 537-38. Plaintiff contacted defendant's office asking in vain for an explanation of what had occurred. Thus, plaintiff both presented evidence of emotional distress resulting immediately after the incident and developed facts and circumstances from which, we hold, the jury could have inferred a reaction of severe emotional distress.

The evidence showed that the emotional distress persisted over the two year interval between the injury and the trial. As a result of the brain injury sustained during the prolonged dental surgery, plaintiff's ability to work was severely curtailed. He experienced great difficulty in concentration and memory, which was illustrated by

testimony of specific problems he encountered in trying to perform ordinary tasks. At one time while working on a painting project, he had experienced much frustration over his inability to recall where he had stopped the previous day. His rehabilitation counselor suggested that he use yellow stick-on notes as a memory aid. Before following that suggestion it had taken him a significant amount of time in the morning to determine where he had stopped the previous day and where he should begin on the new day.[13]

There were other examples given, not all of which we shall recount here. Another rather striking illustration, however, was plaintiff's inability to complete the roof of a doghouse,[14] which was contrasted with much more challenging projects which, before the injury, he had been successfully completing as a matter of course. Plaintiff, his rehabilitation counselor, and other witnesses described the frustration which resulted from his impairment. Plaintiff's wife testified that plaintiff sang in church, accompanying himself on the guitar, about once every two months. Within the year before trial, he had twice attempted to perform in church and been unable to complete the song, she testified. This, she went on to say, had been "very embarrassing and a humiliating thing for him." III App. 763.

We conclude that the evidence was sufficient for submission of the intentional infliction of emotional distress claim to the jury.

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[13]IV App. 1119.

[14]IV App. 1111-12.

VII

Defendant contends that both the actual damages and the punitive damages awarded were excessive. Addressing the actual damages, defendant cites the relatively low amount of plaintiff's past medical bills (about $15,000) and plaintiff's history of modest earnings, which were under $10,000 for each of the three years preceding the injury. This argument is unconvincing, however, because defendant ignores other criteria on which the jury could have, and presumably did, base its award.[15] Considering the pervasiveness of the effects of the brain injury on plaintiff, obviously affecting numerous activities and not merely his ability to earn a living, we do not find the damages to be excessive, especially when even the defendant's expert witness acknowledged that the test results showed that plaintiff had sustained brain injury. III App. 905-06, 917, 924-25, 926, 929-930. The witness also testified that the test results showed no indication that plaintiff was malingering. *Id.* at 925.

In sum, we see no abuse of discretion in the compensatory damages verdicts, nor do we believe that the compensatory damages were so excessive as to shock the judicial conscience.

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[15]In addition to medical expenses and diminution of earning capacity, the jury instructions listed the following as injuries for which plaintiff should be compensated in the event that the jurors had decided in his favor on the claim: mental pain and suffering, past and future; physical pain and suffering, past and future; and physical condition immediately before and after the incident. The jurors were also told to consider the nature and extent of plaintiff's injuries. I App. 124-25.

The abuse of discretion standard of review also applies to defendant's assertion that the award of $300,000 in punitive damages is excessive. *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999). We will not disturb the punitive award unless it is "'so excessive as to shock the judicial conscience.'" *Id.* (quoting *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981)).

One aspect of defendant's argument is that the punitive award was excessive in light of his financial condition. In this case the trial judge reserved the issue of punitive damages for a second stage of trial. Thus, when the jurors deliberated at the end of the first stage, in addition to determining the core liability issues and setting the amount of compensatory damages, they indicated on the verdict form that they found "by clear and convincing evidence that the defendant . . . acted in reckless disregard of the rights of others." I App. 137.[16] At the second stage, defendant testified that the Oklahoma Board of Dentistry had disciplined him as a result of this incident by placing severe restrictions on his license to practice in Oklahoma. The restrictions limit him to practicing under the supervision of another dentist and forbid him from prescribing medications or administering nitrous oxide. Defendant contends that he is effectively barred from practice. Further, he testified that at the time of trial he had no dental practice, no assets, and substantial liabilities

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[16]One of the instructions had explained to the jury that there would be a second stage for affixing the amount of punitive damages if the jury made this finding. I App. 127-28.

including a $70,000 tax lien and two other judgements totaling $12,000.

Defendant argues that in light of his straitened circumstances, punitive damages in the amount of $300,000 manifests the jury's disregard of the trial judge's instruction that the purpose of punitive damages is to punish and not to destroy the defendant. Defendant also refers to other elements of the trial court's instruction on punitive damages and contends that none of the factors which the jury was told to consider support its award. In accordance with Oklahoma law, *see* 23 Okla. Stat. § 9.1(A) (2000 Supp.), the trial judge instructed the jury that it could consider these factors in determining the amount of punitive damages: the seriousness of the hazard to the public arising from defendant's misconduct; the profitability of the misconduct to the defendant; how long the conduct lasted and whether it is likely to continue; whether there were attempts to conceal the misconduct; how aware the defendant was of the conduct and its consequences and how aware the defendant was of the hazard and of its excessiveness; the attitude and conduct of the defendant upon finding out about the misconduct/hazard; and the financial condition of the defendant. I App. 134-35.

Defendant asserts that there was no evidence that his misconduct posed a danger to any other patient; that the incident was not at all profitable and indeed resulted in financial ruin for him; that the incident was isolated and, in view of the restrictions placed upon his practice of dentistry, not at all likely to recur; and that there was no attempt to conceal the misconduct.

Notwithstanding defendant's contentions, we conclude that the seriousness of the misconduct at issue here justifies the jury verdict, and we will not disturb it.[17] We are not persuaded that the $300,000 punitive award was excessive on this record in light of its proper function of punishing the offender and deterring others so as to benefit society. *See Dayton-Hudson Corp. v. American Mutual Liability Ins. Co.*, 621 P.2d 1155, 1158 (Okla. 1980).

VIII

Plaintiff's cross-appeal raises a single issue - whether the district judge erred by not adding prejudgment interest to the award of compensatory damages. Defendant raises only one argument in opposition to this issue, that being that plaintiff waived any such objection to the judgment by not filing a motion under Fed. R. Civ. P. 59(e) with the trial court seeking modification of the judgment.

Defendant's argument is without merit, and the authorities cited are inapposite. We have held that a timely motion to amend the judgment to include prejudgment interest is properly brought under Rule 59(e), and so tolls the time for taking an appeal, because prejudgment interest is considered

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[17]We note also that there was evidence from which the jury could have inferred an attempt to conceal what had occurred. In response to plaintiff's requests for his records, he was told that they had been misplaced. The records were eventually found in defendant's daughter's dresser drawer. Although defendant had an innocent explanation for this oddity - which attributed the event to simple mistake - the jury was of course free to disbelieve that explanation.

part of the plaintiff's compensation and is thus part of the merits of the trial court's judgment. *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 812-13 (10th Cir. 1993). We have also held that after the defendant has filed a notice of appeal, the trial court is without jurisdiction to modify the judgment to add prejudgment interest. *Garcia v. Burlington Northern R.R.*, 818 F.2d 713, 720-22 (10th Cir. 1987). However, defendant cites no authority, nor are we aware of any, which holds that a plaintiff *must* raise this issue by a Rule 59(e) motion in the trial court rather than taking an appeal. The instant case is distinguishable from the authorities on which defendant relies because in this case the plaintiff did bring a timely cross-appeal.

Plaintiff included a request for interest in the complaint. I App. 26. We have indicated that this is sufficient to raise the issue in the district court. *McNickle v. Bankers Life & Cas. Co.*, 888 F.2d 678, 681 (10th Cir. 1989). Prejudgment interest on a federal court's judgment in a diversity case is a matter of state law. *Id.* at 680. Under Oklahoma law, prejudgment interest in personal injury cases is mandatory, runs from the date of commencement of suit, and is to be awarded at a rate set by statute. 12 Okla. Stat. § 727(E). Therefore, on remand the district court should enter an amended judgment in accordance with section 727 adding prejudgment interest at the statutory rate.

Conclusion

Accordingly, the judgment of the district court is affirmed except for the failure to award prejudgment interest; the cause is remanded to the district court for entry of an

amended judgment including prejudgment interest as proper under Oklahoma law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed November 13, 1998]

No. CIV-97-1398-C

MARK MACSENTI,
Plaintiff

vs.

JON D. BECKER, D.D.S., and HEATHER DAVIS,
Defendants

ORDER

This matter is before the Court for consideration of two post-trial motions filed on behalf of the defendant Jon Becker, D.D.S. One motion is a renewal of a motion for judgment as a matter of law ("JMOL") and the other motion is entitled "Alternative Motions for New Trial, Amendment of the Judgment, Remittiter and/or Stay of Proceedings to Enforce Judgment." Some of the same propositions are included in both motions and are addressed in the paragraphs that follow.

Judgment as a Matter of Law

There are two propositions raised in the JMOL motion, each directed at the testimony given by plaintiff's expert. Becker contends the expert's opinion was inconsistent with the scientific knowledge regarding diffusion hypoxia and therefore must be disregarded. Labeling this testimony as completely unreliable, Becker argues it should have been stricken.

Plaintiff's expert, Steven Sullivan, D.D.S., testified the medications Becker administered slowed the plaintiff's breathing rate. In contrast, Becker's expert testified under the circumstances, a slower ventilation rate would not have occurred. Although plaintiff acknowledges the variances in the experts' opinions, plaintiff explains Dr. Sullivan's opinion took into consideration not only the nitrous oxide plaintiff was inhaling, but also the presence of Mepergan Fortis and Halcion, drugs the plaintiff had been given during the dental procedures Becker was performing.

While it is true the experts disagreed as to what caused plaintiff's injuries, and whether the plaintiff even suffered any damage, this is hardly uncommon. The test this Court must apply requires a determination of whether "'the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion.'" McKenzie v. Renberg's Inc., 94 F.3d 1478 (10th Cir. 1996), cert. denied, U.S. ,117 S. Ct. 1468 (1997), quoting FDIC v. United Pac. Ins. Co., 20 F.3d 1070, 1079 (10th Cir.1994). The undersigned, having presided during all aspects of these proceedings, finds that the evidence admitted at trial was sufficient to support the jury's verdict in plaintiff's favor.

Accordingly, the renewed motion for judgment as a matter of law in favor of defendant Becker will be denied.

New Trial, Amendment, Remittitur, and Stay

In a separate motion, defendant Becker offers 13 propositions in support of the requested relief. The requested relief is identified as the granting of a new trial, amendment of the judgment, and remittitur of the amount awarded. Although the motion also refers to a request for a stay of any proceedings to enforce the judgment, no grounds are presented to warrant such relief. The first proposition contained in the brief deals with testimony provided by plaintiff's expert, Dr. Sullivan. Becker relies on the arguments and authorities presented in the motion for judgment as a matter of law. Generally, Becker argues the jury was misled by Dr. Sullivan whose testimony was medically and factually inaccurate. The Court rejected this premise as shown in the previous section. For the reasons stated therein, this first proposition will again be rejected.

In the second proposition, Becker contends the Court should not have sent the plaintiff's punitive damage claim to the jury. Becker contends the plaintiff's evidence sought to establish negligence and argues his conduct was not sufficiently egregious to allow the jury to even consider the imposition of punitive damages. The undersigned, who presided during trial, recalls there was ample evidence admitted to warrant the jury's consideration of this claim. See generally Capstick v. Allstate Ins. Co., 998 F.2d 810, 817 (10th Cir. 1993). The second proposition will be rejected.

The third proposition concerns the award of damages. Becker argues the amount of punitive damages the jury awarded was excessive and not supported by the evidence. Becker also suggests a new trial is warranted because the amount is oppressive. This proposition, which again involves the sufficiency of the evidence, will also be rejected. The jury was presented with ample evidence from which it could, and did, find the plaintiff was entitled to damages. The amount, based on the facts presented here, was not improper or excessive. Capstick, 998 F.2d at 820-23.

The fourth proposition is directed at the judgment entered by the Court. Becker contends the judgment is incorrect and an order of remittitur is appropriate. At trial, the jury was asked to deliberate on the separate claims of negligence and intentional infliction of emotional distress. The jury awarded $500,000.00 on each claim. Thereafter, a judgment in the amount of $1,000,000.00 was entered. Becker complains the million dollar judgment constitutes an impermissible double recovery and speculates that the jury intended for the plaintiff to recover only $500,000.00. The jury was instructed to impose one recovery for any item of damages and Becker admits that the jury instructions correctly state the law. The instructions must be read as a whole and give an accurate statement of the law. United States v. Troutman, 814 F.2d 1428, 1451 (10th Cir. 1987); Lusby v. T.G.&Y. Stores, Inc., 796 F.2d 1307, 1312 (10th Cir.), cert. denied, 479 U.S. 884 (1986). Here, where there is no claim of improper or inadequate instructions to the jury, the Court must assume the jury performed its duty in accordance with those instructions. Becker's fourth ground will be rejected.

In proposition five, Becker argues the evidence was insufficient to satisfy the elements of the intentional infliction of emotional distress. Becker also takes the position that there was no evidence that Becker's conduct caused any emotional distress. Of course, arguments regarding the sufficiency of the evidence are first determined by the Court, which decides whether the jury should be allowed to consider any claim. Here, the undersigned judge presided at all aspects of these proceedings. Having heard the evidence, the Court denied Becker's motion for judgment as a matter of law. In turn, the factual disputes were presented to the jury for resolution. On this record, the Court must reject Becker's fifth proposition because the evidence admitted at trial was sufficient to satisfy the elements of plaintiff's claims and support the jury's verdict.

Becker's sixth proposition deals with his argument that the evidence did not establish plaintiff suffered any injury as a result of Becker's conduct. This argument was also presented in Becker's motions for judgment as a matter of law. For the same reasons the Court announced earlier, proposition six is rejected.

In proposition seven, Becker contends the Court improperly denied his motion for judgment as a matter of law and again relies on the arguments and authorities presented in his renewed JMOL motion. For the reasons stated when addressing that proposition in the other motions, the Court will reject this proposition.

Becker's eighth proposition is directed at the Court's exclusion of evidence and application of the collateral source rule. At trial, Becker sought to introduce evidence that

plaintiff's attorneys paid for certain aspects of plaintiff's medical treatment. Not only did plaintiff testify otherwise, Becker suggests a particular medical diagnosis was expected and directed by those who paid for plaintiff's treatment. This issue was originally presented by a motion in limine. Nothing has been offered herein to convince the Court that its earlier decision should be modified in any respect. This proposition will also be rejected.

The testimony of Holly Stratton is the subject of Becket's ninth proposition. Almost two weeks before the plaintiff's dental procedure, Stratton left her employment with Dr. Becker. Becker reiterates his argument that Stratton's testimony was improper because it was irrelevant and unfairly prejudicial. This topic was first presented by a motion in limine. The Court ruled that Stratton would be allowed to testify and has not been persuaded now to alter that ruling. The Court will reject this claim.

Another topic addressed by a motion in limine reappears in Becker's proposition ten. Becker argues the Court should have excluded any evidence involving Becker's physical and emotional condition on days preceding the plaintiff's dental procedure. Prior to trial, the Court ruled that certain aspects of this type of evidence could be introduced. Plaintiff's counsel heeded the Court's admonitions, and a new trial is not warranted. The tenth proposition will be rejected.

In proposition eleven, Becker argues the Court committed error when it prohibited Becker from presenting evidence that Becker and his family were harassed by the local police department. Becker represents that the Court sustained plaintiff's objection to this evidence. Plaintiff relates

the facts a little differently. Plaintiff explains prior to trial the Court expressed the opinion that it would be proper for the defense to refer to this category of information. Plaintiff's lawyers do not recall any such inquiries of Barbara Becker, or any other witness concerning any pattern of harassment. Based on the parties' representations, Becker has not shown this proposition establishes the granting of the requested relief.

Becker next argues that the Court should not have allowed evidence regarding Dr. Becker's conduct on any day other than the day of the plaintiff's dental procedure. This category of evidence was covered by various motions in limine. Becker has not come forward with any reason for this Court to vary from its earlier rulings. Becker's proposition twelve will be rejected.

In the last proposition, Becker argues the evidence relating to Becker's personal medical records should have been excluded. However, for the same reasons expressed when this issue was presented in the motions in limine, this proposition is also rejected.

CONCLUSION

For the reasons stated above, both of Defendant Becker's post-trial motions are denied.

IT IS SO ORDERED this 13 day of November, 1998.

/s/_____
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed June 16, 1998]

No. CIV-97-1398-C

MARK MACSENTI,
Plaintiff

vs.

JON D. BECKER, D.D.S.,
Defendant.

JUDGMENT IN A CIVIL CASE

xxxx Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Defendant's oral motion for judgment as a matter of law is granted as to defendant Heather Davis.

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, awarded to plaintiff Mark Macsenti and against defendant Jon D. Becker, D.D.S., as to plaintiff's negligence claim in the amount of $500,000.

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, awarded to plaintiff Mark Macsenti and against defendant Jon D. Becker, D.D.S., as to plaintiff's intentional infliction of emotional distress claim in the amount of $500,000.

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, awarded to plaintiff Mark Macsenti and against defendant Jon D. Becker, D.D.S., as to plaintiff's claim for punitive damages in the amount of $300,000.

6/16/98
Date

/s/ ROBERT D. DENNIS
Clerk

/s/_____
(by) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CV-97-1398-C

MARK MACSENTI,
Plaintiff

vs.

JON D. BECKER, D.D.S.,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
THURSDAY, JUNE 11, 1998
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
JUDGE PRESIDING

JURY TRIAL - VOLUME IV OF VI

APPEARANCES

FOR THE PLAINTIFF: MR. KIRK OLSON
MR. TODD GOOLSBY
Attorneys at Law
Oklahoma City, Oklahoma

FOR THE DEFENDANT: MR. JACK S. DAWSON
MR. STEVEN E. BRACKLEIN
Attorneys at Law
Oklahoma City, Oklahoma

* * * * *

[p. 725]

MR. DAWSON: I've got two motions. One is a Daubert motion. I wish I had the citation of the Daubert case. It's for the Court to exclude all of the testimony of Dr. Sullivan about diffusion hypoxia because it flies in the face of all scientific knowledge literature about it. It is unsupported by any scientific evidence whatsoever.

THE COURT: I think the time to make that motion is before he testifies.

MR. DAWSON: Well, I'll have to tell the Court that I didn't know he was going to testify to that version of diffusion hypoxia until he did it. It's -- it comes from left field.

THE COURT: Well, I act as a gatekeeper. That gate opened up when he testified and now the jury is your gatekeeper. I don't think it's appropriate for me to make a Daubert ruling after the testimony has come in.

[p. 726]

MR. DAWSON: Okay.

THE COURT: You may argue it to the jury.

MR. DAWSON: I'm not going to argue it to you. The other thing is we move for a judgment as a matter of law in favor of the defendant.

THE COURT: Denied.

MR. DAWSON: The admissible evidence wholly fails to state an approved cause of action at this time.

THE COURT: Denied.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CV-97-1398-C

MARK MACSENTI, *Plaintiff*	)
vs.	)
JON D. BECKER, D.D.S., and HEATHER DAVIS, *Defendant.*	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, JUNE 10, 1998
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
JUDGE PRESIDING

JURY TRIAL - VOLUME III OF VI

APPEARANCES

FOR THE PLAINTIFF: MR. KIRK OLSON
MR. TODD GOOLSBY
Attorneys at Law
Oklahoma City, Oklahoma

FOR THE DEFENDANTS: MR. JACK S. DAWSON
MR. STEVEN E. BRACKLEIN
Attorneys at Law
Oklahoma City, Oklahoma

* * * * *

[p. 472]

THE COURT: Anything from counsel before we proceed with the defendants' case?

MR. DAWSON: Well, you'll need to rule on my motion for judgment as a matter of law, Your Honor.

THE COURT: You have to make it first.

MR. DAWSON: As I'm fixing to make it. The defendants move the Court for judgment as a matter of law on the grounds and for the reasons that the plaintiff's evidence, taken in the best light, wholly fails to prove or show grounds for recovery on behalf of the plaintiff.

THE COURT: I will overrule your motion as it regards Dr. Becker but I am seriously considering whether there is sufficient evidence against Ms. Davis. Would you please give me your best shot.

(2)

Supreme Court, U.S.
FILED
MAY 29 2001
OFFICE OF THE CLERK

No. 00-1634

In The

Supreme Court of the United States

JON D. BECKER, D.D.S.,

Petitioner,

v.

MARK MACSENTI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When expert opinion testimony is challenged by a Motion to Strike at the close of all evidence (and in connection with a Rule 50 Motion) instead of by a contemporaneous objection, does the danger of unfair surprise to the opposing party relieve a federal court of its duty to make a *Daubert* reliability determination?

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OPINIONS BELOW

The Opinions below are attached to Petitioner's Petition at Appendices A-C.

JURISDICTION

Petitioner adequately invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Federal Rules of Evidence 702.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On July 15, 1996, Respondent Mark Macsenti, sustained hypoxic brain injury as a result of the cumulative effect of exposure to Halcion, Mepergan Fortes and nitrous oxide, which were administered to him during dental implant surgery by the Petitioner Becker. Respondent's surgery was scheduled to last approximately three (3) hours. During the surgery, Petitioner displayed erratic and impaired behavior, and passed out and fell asleep approximately ten (10) to fifteen (15) times. During the surgery, Petitioner abandoned Respondent to appear in municipal court. Respondent was under the influence of the above mentioned medications for approximately ten (10) hours. While Petitioner was appearing in municipal

court, he was detained by the police for the same offense for which he was appearing in court. During processing, Petitioner exhibited slurred speech, was unsteady on his feet, and actually had to be held upright by police officers. After being bonded out of jail, Petitioner returned to his clinic to complete Respondent's dental surgery. Respondent was not discharged from Petitioner's care until 9:00 p.m., or 12 hours after originally arriving at his office. The combined effects of the nitrous oxide, oral medications and the prolonged length of the surgery caused a reduced respiratory rate in Respondent and subsequent oxygen deprivation and injury to his brain.

B. DISPOSITION BELOW

The Respondent filed his initial Complaint on August 26, 1997, and his First Amended Complaint on December 12, 1997. The federal court's jurisdiction was vested on the grounds of diversity pursuant to 28 U.S.C. § 1332. Respondent's Amended Complaint asserted a claim for negligence, intentional infliction of emotional distress, and negligence per se against the Petitioner. On June 8, 1998, a jury trial was had in the United States District Court for the Western District of Oklahoma with the Honorable Judge Robin J. Cauthron, presiding. On June 15, 1998, the jury returned a verdict in favor of the Respondent for $500,000.00 on the negligence claim, $500,000.00 on the intentional infliction of emotional distress claim, and found by clear and convincing evidence that the Petitioner acted in reckless disregard for the rights of others. On June 15th, the same jury returned a verdict of $300,000.00 for punitive damages to be assessed against the Petitioner. The judgment was filed

reflecting the above mentioned claims and amounts on June 16, 1998.

On November 13, 1998, the District Court filed an Order denying Petitioner's two (2) post-trial motions, for judgment as a matter of law and a motion entitled Alternative Motions for New Trial, Amendment of Judgment, Remittiter and/or Stay of Proceedings to Enforce Judgment. The Tenth Circuit filed its opinion on January 22, 2001, affirming judgment of the District Court except for its failure to award post-judgment interest which was requested by the Respondent by cross appeal. It is from that opinion that Petitioner requests this Court to issue a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner states that the question presented in his Petition for Writ of Certiorari is:

> "When expert opinion testimony is challenged by a motion to strike at the close of all evidence (and in connection with a Rule 50 motion) instead of by contemporaneous objection, does the danger of unfair surprise to the opposing party relieve the Federal Court of its duty to make a *Daubert* reliability determination? Pet. at i

The real question presented is whether or not a party can justify its failure to make timely objections, by blaming the trial court for its alleged error and misrepresenting to the appellate court and this Court that they are somehow surprised by the evidence presented by the Respondent's

expert, Dr. Sullivan. A timely objection is a fundamental tool utilized by attorneys to prevent irrelevant and unreliable testimony from being heard by the jury. Petitioner attempts to excuse the failure to object by arguing that the expert changed his testimony at trial. As a result of Petitioner's "surprise", they were unable to make a timely objection. The truth is, Dr. Sullivan had testified before the State Dental Board in related proceedings, and upon deposition in the underlying case and on both occasions offered the same opinion as to causation as he did at trial. Dr. Sullivan's educational background and credentials were never challenged. As the Tenth Circuit aptly pointed out in their opinion at page 21, footnote 5, App. A. Petitioner surely would object at the time the testimony allegedly changed at trial. The reason there was no objection was because there was no change in testimony.

The motion to strike, offered after the close of all the evidence and after all the witnesses had gone home, was the first notice to the Respondent and the trial court that Petitioner had questioned the reliability of Respondent's evidence. Petitioner's belated objection (now based on the flimsy excuse of surprise) was offered in spite of the fact that on opening statement, Petitioner stated that Respondent's case was based on "junk science". Trial Transcript, page 20, line 12; App. B. Yet, in spite of that statement, Petitioner argues that this "junk science" suddenly came out of left field during the trial testimony and that he had no idea that it was forthcoming.

Nothing could be further from the truth. If Respondent's expert changed his testimony at trial from his earlier recorded testimony in both the State Dental Board

hearing and upon deposition as indicated by the Petitioner, then why was said expert never cross-examined at trial using those alleged prior inconsistent statements. The reason is because his statements were not inconsistent. Although Petitioner cross-examined said expert at trial with outdated and irrelevant medical articles, he never once tried to impeach said expert with any of his previous testimony regarding the "new version" of hypoxia. Respondent's expert's opinion on causation was based on sound, well established, scientific evidence obtained readily from Physicians' Desk Reference (PDR), which is the leading text on medications, their effects and how they interact with one another. Everybody seemed to understand the expert's testimony except for the Petitioner. Petitioner has mischaracterized the expert's testimony in the post-trial motions, the argument to the Tenth Circuit and now is wanting to burden this Honorable Court.

In reality, the medicine was very simple. Respondent suffered brain damage as a result of decreased respiration due to the combination of the oral medications that he received in conjunction with the nitrous oxide over a ten (10) hour period. Although Petitioner has argued that Respondent's expert opinion on causation was not based on any reliable scientific proof or medically accepted theory, the PDR was very clear in regard to the cumulative effect of excessive medications that the Respondent received as a result of the treatment by Petitioner, as well as the potentiation effect that was created by the combination of the drugs. The oral medications were all central nervous system depressants which caused decreased respiratory rate and depth leading to a lack of adequate

oxygen going to Respondent's brain which caused the admitted brain damage.

The trial court heard and analyzed the testimony of the expert and without objection presumably found that his testimony and the foundation for said testimony was reliable and allowed testimony to proceed. Again, the causation issue is not complicated. Especially in light of the fact that Respondent was under the influence of the medications for approximately ten (10) hours with little or no monitoring. Petitioner further attempts to cloud the issue by interjecting the issue of "diffusion hypoxia" into the mix. Counsel for Petitioner is either intentionally misleading the court or is confused himself as to the difference between "diffusion hypoxia" and "defuse hypoxia". The diffusion hypoxia, that Petitioner continues to reference, had very little to do with the mechanism that brought about the brain damage to Respondent.

In support of their assault on Respondent's expert, Petitioner states that Dr. Sullivan testified that nitrous oxide passes into the blood stream. That statement is not true. Dr. Sullivan testified that because of the low ventilation and the presence of nitrous oxide in the lungs, that less oxygen passed into the blood stream, not that the nitrous oxide itself passed into the blood stream. Again, Petitioner is confused or is attempting to confuse this Court. Petitioner keeps harping on the fact that nitrous oxide when used alone is safe for extended periods of time. This premise is uncontested. The key is the oral medications, which are central nervous system depressants, caused a decrease in the respiratory rate and depth which decreased ventilation in the lungs. Because of the already decreased ventilation, the nitrous oxide made a

small contribution to the hypoxia. As a result, Dr. Sullivan was correct in his statement that there was diffusion hypoxia occurring but it was not the typical diffusion hypoxia as discussed in the medical articles dealing with the administration of nitrous oxide alone.

Next, Petitioner argues that reliable science says there is no potentiation. This statement is absurd. Common sense mandates, for example, that one should not drink alcohol and take pain medications at the same time. The increased effect of two medications acting together is "potentiation" and what Dr. Sullivan described. Because Respondent was under the influence of the sleeping pill Halcion, pain medication Demerol and the anti-nausea medication Phenergan, these three medications potentiated each other. The PDR was clear that this combination would increase the effects of the other medications and as a result recommended that the amounts of each medication given should be decreased due to this potentiation. For Petitioner to state to this court that there is no such thing as potentiation is dangerously close to being sanctionable.

Next Petitioner attempts to obviate his duty to make a timely objection by blaming the trial court for refusing to give him a *Daubert* analysis upon his motion to strike. Even a first year law student understands that a *Daubert* motion is made prior to the expert's testimony or at least contemporaneously with it. The Tenth Circuit held Petitioner to that standard which was and is the current law of the Tenth Circuit. Additionally, although Petitioner maintains that the Tenth Circuit failed to scrutinize Dr. Sullivan's testimony, they thoroughly examined in their opinion as to how Dr. Sullivan's testimony was supported

by sound scientific principles and exhibited a great understanding of his testimony as to the combination of medications and potentiation. Further it is clear from the trial court's comments both immediately following the trial and in the opinion on post-trial motion rulings that the trial court also understood the basic scientific principles and Dr. Sullivan's theory of causation. It was properly noted by the Tenth Circuit there is nothing in *Daubert* that says that the trial court cannot conduct analysis *sub silentio*.

Petitioner next argues that under the law at the time of the trial, Dr. Sullivan's expert opinion was not objectionable under the controlling case authority of the Tenth Circuit. However, his argument here is that his "*Daubert*" objection was not sustained by the trial court. This argument makes no sense. He either had grounds for a *Daubert* objection or he didn't. Petitioner then argues that the only time that he could have properly made the objection to the testimony of Respondent's expert was after all the evidence was presented. The timing of the objection and the motivation behind this appeal are suspect, especially when examined in conjunction with Petitioner's statement in opening argument that Respondent's case was based on "junk science".

Lastly, in response to the Tenth Circuit's opinion that at the very least, Petitioner should have objected to Dr. Sullivan's testimony when he introduced his "new version" of diffusion hypoxia, Petitioner argues that changed testimony is not grounds to object. Petitioner argues that he assumed that Respondents would offer additional evidence to support the new version. There is no basis for

that argument in that Respondent had no additional witnesses to offer in regard to causation. The only other expert to testify was a neuropsychologist who had no opinion as to causation and had expressed that to Petitioner in a pre-trial deposition. As a result, Petitioner knew that Dr. Sullivan's testimony was the last evidence to be presented by the Respondent in regard to causation.

The bottom line is Petitioner has no valid or credible argument for the failure to make a pre-trial and/or contemporaneous objection to the expert testimony. Counsel for Petitioner stated on opening that Respondent's case was based on "junk science". Dr. Sullivan testified consistent with his previous testimony and Petitioner's alleged "new version" is simply a red herring. For the above reasons and the arguments to follow, Respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

I.

The Tenth Circuit's opinion does not conflict with this court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Weisgram v. Marley Company*, 528 U.S. 440, 120 S.Ct. 1011, 145 L. Ed. 2d 258 (2000). In *Daubert*, the court ruled that the Federal Rules of Evidence, specifically 702, govern the admission of expert testimony in federal trials. While it did assign the "gate keeping" responsibility to the trial judges to ensure that the evidence presented was both relevant and reliable, it gave the trial court broad latitude in doing so. It prescribed no specific rules as to what particular factors would be used

in making the reliability determination and made no requirement of the *sua sponte* assessment on the record absent timely objection.

Petitioner states in his petition that the Tenth Circuit sanctioned the trial court's abandonment of this "gate-keeping" obligation. In fact, the Tenth Circuit assumed that the trial court performed its function *sub silentio* in light of the fact that the Petitioner failed in his obligation to make a timely objection. It is well settled in the Tenth Circuit and other Circuits that failure to make an objection waives the right to review absent plain error. This court will recall that *Daubert* was a case decided on a motion for summary judgment by the trial court in which the issue of the expert's reliability was fully briefed by both sides and the court made a fully informed decision based upon the evidence and arguments presented. The Tenth Circuit's reasoning behind the requirement of making a timely objection is to allow the court to make a reviewable ruling if that issue is appealed, and allow the plaintiff to offer additional argument and evidence if needed to demonstrate the reliability of the expert's testimony. The Tenth Circuit's opinion was based upon sound legal precedent and fundamental fairness.

Petitioner argues that the Tenth Circuit's reasoning of "unfair advantage" is counter to the holding in *Weisgram*. Petitioner's reliance on *Weisgram* is misplaced. *Weisgram* held that Rule 50 permits an appellate court to direct entry of judgment as a matter of law when it determines that the evidence was erroneously admitted at trial. This court has previously ruled on that issue in the case of *Neely v. Martin K Aby Construction Co.*, 386 U.S. 317, 87

S.Ct. 1072, 18 L. Ed. 2d 75 (1967). It is true that in *Weisgram* this court ruled that there would be no unfair advantage. In *Weisgram* the Plaintiff had offered all the evidence and arguments that they could to shore up their expert's testimony because the Defendant had challenged the expert's testimony both in a pre-trial motion and contemporaneously with the offer of the evidence.

As a result of those pre-trial and contemporaneous challenges to the testimony, there is no doubt that *Weisgram* was "on notice every step of the way" that the expert's testimony would be facing great challenges to the admissibility. Therefore, this court ruled there could be no unfair advantage.

In the present case, no objection was made either before or during the trial testimony and as a result the plaintiff had no need to "shore up the plaintiff's testimony". Further, because in *Weisgram* the proper objections were waged at the trial level, the Eighth Circuit reviewed the evidence in question. In this case, because there was no objection to the testimony, the Tenth Circuit ruled that any objection was waived and therefore reviewed only for plain error. As a result, the *Weisgram* case is clearly distinguishable from the present case and is not in conflict with the Tenth Circuit's opinion here.

II.

The requirement of a timely objection is fundamental to trial advocacy. A special custom built exception for expert testimony should not be carved out by this Court to benefit the Petitioner. Petitioner attempts to argue that this court needs to grant certiorari, and render an opinion

as to when a *Daubert* objection must be made. Objections are made in a timely manner in an effort to limit irrelevant and unreliable testimony as well as to allow the court to make reviewable rulings for appeal. Petitioner cites cases from the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, which hold that no *sua sponte Daubert* analysis need be performed when a timely objection is not made. However, Petitioner fails to cite any persuasive authority that holds otherwise. He simply argues that the trial court cannot make an adequate decision until all the evidence is in. This argument flies in the face of all motion and trial practice. Although the Petitioner filed numerous motions in limine in this case, he neglected to file any pleading on this critical issue to limit Respondent's expert testimony. Petitioner's position is increasingly suspect when examined in light of Petitioner's counsel's bold declaration in opening argument that Respondent's case was based on "junk science". Petitioner is simply seeking a reprieve from this Honorable Court, to be rescued, and ultimately rewarded for his failure to make a timely and proper objection.

Petitioner argues that the trial court made no *Daubert* analysis. The Rules of Evidence require the court to continuously evaluate the evidence as it is offered to ensure its relevance and reliability. Because Petitioner failed to make timely objections the trial court was silent as to this analysis. Petitioner now attempts to use that silence against the trial court. While it is true that the trial court in response to Petitioner's motion to strike at the close of the evidence did not elaborate on the specifics of any *Daubert* analysis, it is clear from the trial court's rulings and judicial commentary that Dr. Sullivan's testimony

was comprehensible and reliable. In fact, in the argument for judgment as a matter of law in regard to co-defendant Heather Davis, the trial court stated on the record that the nitrous oxide had little to do with the injury to Respondent but that it was polypharmacy and the effects of medication on each other that caused Respondent's brain damage. Petitioner seems to want this court to believe that the trial court neglected to conduct an evidentiary analysis and because there was no objection made, did not listen to the testimony and refused to perform a "gatekeeping" function. That is clearly not true. The court has a continuing obligation to make sure that the evidence presented is both relevant and reliable and the trial court did that in this case.

Petitioner continues to recycle the argument that he had no idea that Dr. Sullivan was going to change his testimony and that's the reason he did not make a *Daubert* objection. Petitioner cannot be allowed to run from the opening statement of his counsel which set the tone for the trial and laid the foundation for this appeal. If Petitioner knew before Dr. Sullivan ever testified that his opinion was based upon "junk science", then he cannot make an honest argument as to surprise. If Petitioner wasn't surprised (and he wasn't) Petitioner's entire argument must fail.

CONCLUSION

The trial court properly denied Petitioner's request for *Daubert* analysis at the close of the evidence and the Rule 50 motion. The Tenth Circuit properly upheld the

trial court's decision. Petitioner argues that both the trial court and the Tenth Circuit failed in their duties to assure that testimony offered at the trial was reliable. It is simply not the case. In truth, it is Petitioner's counsel's failure that has him in this position and this Court should not reward that failure by granting the petition for certiorari. As a result Respondent respectfully requests this Honorable Court to deny petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

[1] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK MACSENTI,

Plaintiff,

vs. CASE NO. CV-97-1398-C

JON D. BECKER, D.D.S., and HEATHER DAVIS,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, JUNE 8, 1998
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
JUDGE PRESIDING

JURY TRIAL – VOLUME I OF VI

APPEARANCES

FOR THE PLAINTIFF: MR. KIRK OLSON
MR. TODD GOOLSBY
Attorneys at Law
Oklahoma City, Oklahoma

FOR THE DEFENDANTS: MR. JACK S. DAWSON
MR. STEVEN E. BRACKLEIN
Attorneys at Law
Oklahoma City, Oklahoma

* * *

[20] doctor who teaches pharmacy at the OU med school. I think you'll see that he knows what he's talking about.

The combination of all of these, there have been studies done – there has never been a study done of these exact drugs in combination. It just hasn't been done. All of the studies ever done of anything like this, of any drugs similar, all show that they are not harmful to take – to be taken in combination. It's just scientifically wrong to say that they are.

The N20, the nitrous oxide, does not compete with oxygen in your blood stream. It cannot compete with oxygen in your blood stream. Oxygen is carried by hemoglobin. N20 can't even bind with hemoglòbin. That is bunk. Junk science is what that is.

You will meet Mark Macsenti. Mark Macsenti is a pretty nice guy. He was born and raised out in California. He principally worked as a waiter and construction jobs, which is fine, and learned to play the guitar. His claim to fame is a guitar player and a composer of songs and an artist. Kind of a poetic kind of fellow.

In 1992, you'll learn that Mark Macsenti moved to Oklahoma to live in a house that his mother had inherited from his grandfather. His mother still lives out in California. A small house out by Clinton. He comes to Oklahoma in 1992 and starts to work. In 1992, the whole year, he made $1,320. His occupation, I don't know exactly what it was. The income tax are blank for that year.

* * *

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK MACSENTI, Plaintiff-Appellee and Cross-Appellant, v. JON D. BECKER, D.D.S. Defendant-Appellant and Cross-Appellee, HEATHER DAVIS, Defendant.	)	Nos. 98-6485, 99-6012

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CV-97-1398-C)

(Filed Jan. 22, 2001)

Robert Todd Goolsby, Goolsby, Olson & Proctor, Oklahoma City, Oklahoma (Kirk Olson and David Proctor with him on the briefs) for Appellee and Cross-Appellant.

Jack S. Dawson, Miller Dollarhide, Oklahoma City, Oklahoma, (James A. Scimeca and Steven E. Bracklein with

him on the briefs) for Appellant and Cross-Appellee.

Before **EBEL, HOLLOWAY** and **HENRY**, Circuit Judges.

HOLLOWAY, Circuit Judge.

* * *

We are convinced that the motions were untimely here.[5] By waiting until after the close of all the evidence to raise the *Daubert/Kumho* objection, basic errors occurred. The proponent of the evidence was deprived of the opportunity to offer other supporting proof from Dr. Sullivan and from literature. Moreover the trial judge was

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[5] Defendant seems to try to justify his failure to make contemporaneous objections at trial on the *Daubert* issue by asserting that he was surprised by a change in Dr. Sullivan's theory, his testimony at trial allegedly being in conflict with testimony he had previously given before the Oklahoma Board of Dentistry. On its face, however, this rationalization fails: If the testimony was unexpected and a departure from the witness's previously expressed opinion, that would seem to amplify the motivation to raise the issue at once. Objection should have been made *at the latest* when the allegedly new and different explanation was given at trial.

This would have given the trial judge the opportunity to evaluate the basis of the testimony and would have given the plaintiff the opportunity to provide further foundation for the testimony. We also note that defendant had taken Dr. Sullivan's deposition before trial and explored the basis for his opinion, *see* III App. 692-93, and in opening statement characterized Dr. Sullivan's theory as "junk science," II App. 328. In short, we are not convinced that defendant was surprised by the trial testimony, but in any event nothing excuses the failure to make timely objection at trial.

disadvantaged in that she was not alerted to the need of stating *Daubert/Kumho* findings and analysis. And, obviously, appellate review by us is impaired as well, due to the inadequacy of the record. Accordingly on this record and persuasive precedent we hold that the *Daubert/Kumho* objection was waived, and our review is only for plain error.

On careful review of this record, we find no plain error in the rejection by the trial judge of the belated *Daubert* objection. Dr. Sullivan's general theory was that the injury here resulted from the excessive combined use of central nervous system depressants. His opinion on the specifics of this case, in the absence of published studies on this

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